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European University Institute

Department of Law

Thesis Entitled

**The Circulation, Use and  
Conceptualization of  
European Sex Equality Norms:  
a comparative analysis.**

*Submitted by Claire Kilpatrick to*

Professor Brian Bercusson, University of Manchester (co-supervisor)

Professor Bob Hepple, University of Cambridge

Professor Antoine Lyon-Caen, University of Paris X Nanterre

Professor Silvana Sciarra, European University Institute (co-supervisor)

Professor Spiros Simitis, University of Frankfurt

*with a view to obtaining the Doctoral Degree in Laws*

LAW  
Gr 9  
KIL











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# Contents

<b>Introduction</b>	<b>1</b>
<b>Chapter 1 - Legislative Maps</b>	<b>12</b>
<b>1. United Kingdom</b>	<b>12</b>
1.1 The two acts	12
1.2 The principle of symmetry	13
1.3 Equal Pay Act: basic design	13
1.4 Sex Discrimination Act: basic design	14
1.4.1 Individual enforcement	14
1.4.2 Institutional enforcement	16
1.4.3 Exceptions	17
<b>2. France</b>	<b>19</b>
2.1 Equals rights and non-discrimination	19
2.1.1 Art.L.123 c.trav.	20
2.1.2 Art.L.140 c.trav.	21
2.1.3 Equal opportunities	22
2.1.3.1 <i>Informational requirements</i>	22
2.1.3.2 <i>Temporary 'catch up measures'</i>	24
2.1.3.3 <i>Employment equality plans</i>	25
2.1.4 Employees of nationalised enterprises and public servants	26
<b>3. European Community</b>	<b>28</b>
3.1 Relative positioning	30
3.2 Design and content	31
3.2.1 Definitions of equality and discrimination	31
3.2.2 Scope	32
3.2.2.1 <i>Material Scope</i>	32
3.2.2.2 <i>Personal Scope</i>	33
3.2.2.3 <i>Exceptions</i>	33
<b>4. Conclusion</b>	<b>35</b>
<b>Chapter 2 - Effective Utilisation of Equality Rights: equal pay for work of equal value in France and the UK</b>	<b>36</b>
<b>1. Introduction</b>	<b>36</b>
<b>2. Why does equal value exist?</b>	<b>36</b>
<b>3. Equal value at European level</b>	<b>40</b>
3.1 The text	40
3.2 Assessment of the text	41
<b>4. Problems and prospects: the individual litigation enforcement mechanism</b>	<b>43</b>
<b>5. Legislative development of equal pay for work of equal value in France and the UK</b>	<b>46</b>
5.1 Pre-1983	46
5.2 The EC intervenes	47
5.3 The new shape of equal value: institutional role distribution and content	48

<b>5.3.1 Courts and Tribunals</b>	<b>48</b>
<b>5.3.2 Conciliation bodies</b>	<b>50</b>
<b>5.3.3 Official equality agencies</b>	<b>51</b>
<b>5.3.4 Labour Inspectorate and Public Prosecutor</b>	<b>52</b>
<b>5.3.5 Secretary of State for Employment</b>	<b>53</b>
<b>5.3.6 Unions</b>	<b>53</b>
<b>5.3.7 Specialised pressure groups</b>	<b>56</b>
<b>5.3.8 Experts</b>	<b>56</b>
<b>5.4 Analysis</b>	<b>57</b>
<b>6. Litigation post-1983</b>	<b>58</b>
<b>6.1 Levels of equal value litigation</b>	<b>58</b>
<b>7. Strategic use of litigation by UK unions</b>	<b>63</b>
<b>8. Deciphering the utilisation puzzle</b>	<b>65</b>
<b>8.1 The importance of an equality agency or its functional equivalent</b>	<b>67</b>
<b>8.2 Differing equality topographies</b>	<b>71</b>
 <b>Chapter 3 - The case law landscape</b>	 <b>72</b>
<b>1. Introduction</b>	<b>72</b>
<b>2. United Kingdom</b>	<b>73</b>
<b>2.1 The 1970s: exploring the utilisation of the national provisions</b>	<b>73</b>
<b>2.2 The 1980s: reach expanded, depth diminished and the arrival of Community law</b>	<b>77</b>
<b>2.2.1 Direct discrimination</b>	<b>77</b>
<i>2.2.1.1 Sexual harassment</i>	<i>79</i>
<i>2.2.1.2 Inferences in direct discrimination</i>	<i>80</i>
<i>2.2.1.3 The interpretation of 'on the ground of sex'</i>	<i>80</i>
<b>2.2.2 Indirect discrimination: the good, the bad and the ugly</b>	<b>82</b>
<i>2.2.2.1 Requirement/condition</i>	<i>83</i>
<i>2.2.2.2 A considerably smaller proportion of women than men can comply</i>	<i>83</i>
<i>2.2.2.3 Justifiability</i>	<i>84</i>
<i>2.2.2.4 Which is to her detriment because she cannot comply</i>	<i>86</i>
<b>2.2.3 The arrival of Community law</b>	<b>87</b>
<b>2.3 The 1990s: the necessity to have systematic recourse to Community Law</b>	<b>90</b>
<b>2.3.1 The exception to the Community law recourse rules: non-comparative direct discrimination issues</b>	<b>90</b>
<b>2.3.2 The 'soft' touch of Community law: sexual harassment in the British courts</b>	<b>91</b>
<b>2.3.3 Resisting the inevitable: comparator problems, British courts and Community sources</b>	<b>94</b>
<i>2.3.3.1 Comparator problems: dress codes, homosexuals and transsexuals</i>	<i>95</i>
<b>2.3.4 Indirect discrimination</b>	<b>97</b>
<i>2.3.4.1 Requirement/condition</i>	<i>98</i>
<i>2.3.4.2 A considerably smaller proportion of women than men can comply</i>	<i>101</i>
<i>2.3.4.3 Justifiability</i>	<i>104</i>
<i>2.3.4.4 Which is to her detriment because she cannot comply</i>	<i>106</i>
<b>2.3.5 EC law: the commotion of the commonplace</b>	<b>106</b>
<i>2.3.5.1 The continuing battle over s.6(4) SDA</i>	<i>106</i>
<i>2.3.5.2 Time limits emerge</i>	<i>107</i>

2.3.5.3 <i>Upper limits on SDA compensation</i>	110
2.3.5.4 <i>The big targets</i>	110
2.3.5.5 <i>The new situation</i>	115
2.3.5.6 <i>The fallout Part 1: s.66(3) SDA</i>	119
2.3.5.7 <i>The fallout Part 2: the MoD cases</i>	119
2.3.5.8 <i>The fallout Part 3: time limits and arrears limits - a new approach</i>	122
<b>3. The ECJ and the ETD</b>	126
<b>4. The French case law landscape</b>	130
4.1 <b>Cases utilising national sources</b>	131
4.2 <b>Cases using a mixture of national and supranational sources</b>	139
4.3 <b>Cases utilising purely supranational sources</b>	144
4.4 <b>Cases before the Conseil d'Etat</b>	144
<b>5. Reviewing the case-law landscape: dialogue(s) between sources?</b>	146
5.1 <b>First generation dialogue</b>	148
5.2 <b>Second generation dialogue</b>	153
5.3 <b>Third generation dialogue</b>	155
 <b>Chapter 4 - The rest of the landscape: equality strategies and equal opportunities</b>	 157
1. <b>Introduction</b>	157
2. <b>The topography of equality: desegregation and re-evaluation strategies</b>	158
3. <b>The weighting of strategies in the legislative maps</b>	160
4. <b>Development of the maps: explaining the normative dynamics</b>	162
4.1 <b>France: making litigation formal equality and voluntary desegregation substantive equality</b>	163
4.2 <b>UK: privileging re-evaluation through litigation as substantive equality</b>	168
4.2.1 <b>The non-development of formal investigations</b>	169
4.2.2 <b>The valorisation of re-evaluative litigation strategies</b>	171
4.2.2.1 <i>The EC beckons</i>	171
4.2.2.2 <i>Connecting EC Impact with Normative Dynamics</i>	174
5. <b>Positive action as substantive equality: different maps, similar results</b>	178
5.1 <b>Convergence: positive action and equal opportunities in France, the UK and the EC</b>	179
5.1.1 <b>The UK</b>	179
5.1.1.1 <i>Positive action in the legislative map</i>	179
5.1.1.2 <i>Technique and methods of realising positive action</i>	181
5.1.1.3 <i>Equal opportunities and positive action in the UK: quantity and quality</i>	184
5.1.1.4 <i>Rationales advanced for equal opportunities or positive action</i>	187
5.1.2 <b>France</b>	189
5.1.2.1 <i>Positive action in France: qualitative and quantitative analysis</i>	189
5.1.3 <b>The EC map: what might 'positive action' mean?</b>	193
5.1.3.1 <i>Equal treatment, equal pay and positive action</i>	195
5.1.3.2 <i>Article 2(4) and positive action</i>	196
5.1.3.3 <i>The equality principle, Article 2(4) ETD, Article 6(3) ASP and positive action</i>	198
5.1.3.4 <i>The derogations from Article 2(1): degrees of scrutiny</i>	203
5.1.3.5 <i>It ain't necessarily so: reanalysing positive action and its relationship with equality</i>	206

<b>Chapter 5 - Pregnancy and Beyond</b>	<b>212</b>
1. Introduction	212
2. Basic Provision	213
3. Examination of the Rationales	215
3.1 The UK: voluntarist and business efficiency rationales	215
3.1.1 The legislation	216
3.1.2 Judicial interpretation of maternity rights: fragile rights, managerial prerogative and the contract	222
3.1.2.1 <i>The statutory analysis</i>	224
3.1.2.2 <i>The contractual analysis</i>	225
3.1.3 Supplementing the 'floor of rights': employers and collective bargaining partners	228
3.2 Health and safety rationale: the Pregnancy Directive	230
3.2.1 Changing the proposal	231
3.2.2 The three issues	232
3.3 Equality rationale: the ETD, the SDA, the ECJ and the UK courts	234
3.3.1 The first comparative approach: no comparison possible	235
3.3.2 The second comparative approach: the hypothetical man	235
3.3.3 The no-comparison necessary approach	236
3.3.3bis Doctrinal evaluation of the various comparator approaches	238
3.3.4 Combined approach 1: the temporal distinction in <i>Hertz</i>	239
3.3.4bis Doctrinal evaluations of the temporal distinction	240
3.3.5 Combined approach 2: sidestepping the no-comparison necessary approach	240
3.3.6 Combined approach 3: the ECJ plays with 'the protected period'	244
3.4 Preliminary assessment	247
3.5 Protected worker rationale: France	249
3.5.1 The legislation	249
3.5.2 Judicial interpretation of the legislation	254
3.5.3 Collective bargaining on pregnancy and maternity	258
4. Rationales informing pregnancy regulation: perspectives and evaluation	258
5. Beyond Pregnancy: regulation of the post-birth period	262
5.1 Post-birth regulation in the UK	262
5.2 Post-birth regulation in France	263
5.3 Post-birth regulation at EC level	264
5.3.1 Post-birth mother-only leave	265
5.3.2 Parental leave	270
<b>Chapter 6 - The Female Night Work Ban: Interactions with Equality Conceptions and Employment Regulation</b>	<b>273</b>
1. Introduction	273
2. The introduction of equal treatment law and female-specific employment regulation: the process of justification	276
2.1 The legal framework of female-specific employment regulation	276
2.1.1 Hours of work regulation	276
2.1.2 Other types of female-specific employment regulation	279
2.2 The UK in the first period: 1969-1979	282



2.3 France in the first period: the Roudy Law and female-specific employment regulation	285
3. Subsequent legislative developments: manipulating equality	288
3.1 The UK in the second period: 1979-1989	288
3.1.1 The EOC report in 1979	288
3.1.2 The process of abolition: the Sex Discrimination Act 1986 and the Employment Act 1989	291
3.1.2.1 <i>Making equality = repeal</i>	291
3.1.2.2 <i>Making equality = almost repeal</i>	294
3.2 France in the second period: post-1983	295
3.2.1 The 1987 law	296
3.3 Comparing models of regulation: UK, France and Italy	300
4. Night works in the Courts: national, supranational and international norms	303
4.1 Putting the collective derogation system in practice: France and Italy	303
4.2 Female night work models and equality formulations	308
4.3 The preliminary references	312
4.3.1 Arguments on the norm	315
4.3.2 The Court on the norm	317
4.3.3 Arguments on the formulation of equality	318
4.3.4 The EC equality formulation and its application to night work	319
4.4 Reception and circulation of the ECJ's night work jurisprudence: the dual seductiveness of the supranational norm	321
4.4.1 Courts in referring countries: France and Belgium	321
4.4.2 Courts in non-referring countries: Germany and Italy	323
5. Outside the Courts: the EC, the Member States, the trade unions and the ILO	329
5.1 The EC and the Member States	329
5.2 The ILO, Convention No.89 and the Member States	332
5.3 French Unions and female night work	334
5.4 Legislative developments: filling the holes left by repeal?	338
5.4.1 The EC Working Time Directive	343
5.4.2 ILO: the 1990 night work standards	346
5.5 The Member States	348
6. Formal and substantive equality and night work regulation	351
6.1 From noise to silence: doctrinal interest in the relationship of female night work with equal treatment	351
6.2 Silence and straightforward approbation: UK doctrinal comment on repeal of female-specific regulation	356
6.2.1 Explaining the silence: formal and substantive equality in the UK night work debate	358
6.3 And ne'er the twain shall meet: sex equality and labour law analysis in French doctrinal comment on female night work regulation	364
6.3.1 Equality (and non-discrimination) as general principles in the French legal system	365
6.3.2 Formal and substantive equality as organising principles in French labour law	368
6.3.3 Equality of treatment on grounds of sex	373
6.4 Toward conceptual articulation?: formal and substantive equality in the Italian night work debate	376
7. Conclusion	381
Chapter 7 - Conclusions	385

<b>1. The use and content of equality sources: from the bottom-up, the middle ground and the top-down</b>	<b>385</b>
1.1 The bottom-up: utilisation and ownership of equality laws	385
1.2 The middle ground: national courts and dialogue between sources	387
1.3 The top-down: the ECJ and equality sources	392
<b>2. Evaluating equality laws and the meanings of formal and substantive equality</b>	<b>395</b>
2.1 As 'mobilization' around 'law'	396
2.2 As a critique of symmetrical and comparative approaches	397
2.3 As evaluations of equality strategies	398
2.4 As disagreements on whether legal measures breach equality norms	398
2.5 As the failure of equality laws to open the public/private divide	400
2.6 As concepts in labour law and sex equality	401
<b>Bibliography</b>	<b>403</b>

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# Introduction

‘It is the comparative dimension which has often been lacking from our discussion, by which I mean not the foolish search for institutions to import from elsewhere but the stretching of the imagination and of the agenda by inquiry into unfamiliar legal treatments of familiar social problems and in so doing to follow the argument wherever it leads’.

Lord Wedderburn, ‘The Social Charter in Britain: Labour Law and Labour Courts?’  
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Gender inequality<sup>1</sup> is certainly a familiar social problem. One of its most tangible manifestations is the situation of women on the labour market. This situation is characterised by the pervasiveness and persistence of the horizontally and vertically segregated nature of ‘women’s work’, the gendered construction of skill which is intrinsically linked to lower pay for women, and the predominance of women in so-called ‘atypical’ or marginal employment forms. Indeed, increasing investigation into the situation of women, ethnic minorities and other disadvantaged groups, such as older workers, on the labour market has led to an important change of focus in the study of industrial relations and labour law.

In the first place, alongside the traditional focus on the subordination of the worker within the contract of employment and the need for workers to band collectively to counterbalance the vertical inequality of the relationship between employer and employee, has come an insistence that horizontal inequalities - that is inequalities within and between workers - constitute a challenge of similar magnitude for labour regulation. Hence it is argued that efforts must be made to fashion regulatory techniques and structures which will address both types of inequality.

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<sup>1</sup> I have tended to use the term sex equality more frequently than the term gender equality in this thesis as this is the terminology utilised by the legislation examined and by the courts. This does not imply agreement with the view that differences between ‘men’ and ‘women’ are biologically determined rather than socially constructed.

In the second place, the specific focus on gender has problematised the boundaries between the public sphere of paid labour market work and the private sphere of unpaid caring work. In particular, in labour law, it has challenged legislative, collective and employer-imposed norms which construct and reward employees who fit a particular model. In showing that women find it more difficult to fit this model, the gender focus also reveals that the 'haves' on the labour market - those who can fit the 'normal' employee model, mostly men - are wholly dependent on the existence of the 'have-nots',<sup>2</sup> or perhaps, more accurately, the 'have-lesses', mostly women in order to participate in the labour market in the way in which they do. Moreover, to maintain a set of labour market norms where 'full-time', uninterrupted participation on the labour market is the expectation also means that the real 'haves' tend to be employers as current labour market organisation tends to ignore or marginalise the many other important responsibilities and needs that workers - both male and female - may have: to acquire knowledge, to be active parents, to work safe in the knowledge that their children are being properly cared for, to care for parents or grandchildren, perform voluntary work and have time for social activities. Trying to rethink labour market norms to accommodate these needs is both a giddy and an awesome task as it requires tackling many of our most 'matter-of-fact' assumptions about how market work and other activities - in particular care work - are organised and valued.

From these vertiginous speculations, we can turn to see what tools have been forged in order to challenge gender inequalities on the labour market, in particular, the gendered construction of jobs, skill, pay and employment forms. In a European context, an important starting point is the corpus of laws created by the European Community. It has been said that 'the history of Community labour law has yet to be written'.<sup>3</sup> Yet, there can be little doubt that an essential part of that history will be the development of sex equality in Community law. A panoramic view of the adoption by the Community of social policy measures to tackle vertical and horizontal inequalities reveals that sex equality policy occupies a rather particular position. In terms of formulating norms to alleviate vertical inequalities, Community social policy has been accurately

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<sup>2</sup> Galanter, 'Why the 'haves' come out ahead: Speculation on the limits of legal change', 9 *Law and Society Review* (1974) 95.

<sup>3</sup> Simitis and Lyon-Caen, 'Community Labour Law: A Critical Introduction to its History', in P. Davies, A. Lyon-Caen, S. Sciarra, S. Simitis, *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn* (Clarendon Press: Oxford, 1996) 1 at 2.

characterised as the 'Cinderella' of Community law;<sup>4</sup> while Community action sits in the fast lane - hell bent on getting to the 'ball' of market integration (accentuating vertical inequalities and reducing Member States' scope to pursue their own social policies in the process)<sup>5</sup> - social policy sits in the slow lane or, as Shaw puts it, the 'twin-track' of Community law.<sup>6</sup>

In terms of tackling horizontal inequalities, sex equality law has a strong claim to be the only brightly shining star in the EC social policy firmament. As Hepple remarks, 'legal intervention against other forms of social discrimination remains patchy at national level, and non-existent at Community level'.<sup>7</sup> Sex equality has had a Treaty article of its own from the outset. A shaft of directives on sex equality were adopted throughout the 1970s and 1980s as an acceptable way of giving what Shanks has termed, 'a human face' to the EC.<sup>8</sup> A plethora of 'soft law' measures have been adopted within this sphere. Moreover, the momentum in the sex equality field has been sustained by over 100 judgments on sex equality sources in preliminary reference procedures which have been given by the European Court of Justice (ECJ), adding often unexpected flesh and blood to Community sex equality policy.

The emphasis on sex equality at Community level is important for another reason. It meant that the Member States were obliged to comply with the principle of equal pay in Art.119 and to implement the equality directives into their national legal orders. To a student of labour law in the UK at the beginning of the 1990s, EC law on sex equality - particularly as interpreted by the ECJ - seemed to be a very brightly shining star indeed. The broadly worded obligations laid down in

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<sup>4</sup> Szyszczak, 'Social Policy: a Happy Ending or a Reworking of the Fairy Tale' in D. O'Keeffe and P. Twomey (eds) *Legal Issues of the Maastricht Treaty* (Wiley: Chichester, 1996) 313.

<sup>5</sup> See Leibfried and Pearson, 'Social Policy' in H. Wallace and W. Wallace (eds) *Policy Making in the European Union* (3rd edn OUP: Oxford, 1996) 185 and Lord Wedderburn, 'Freedom and Frontiers of Labour Law' in Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (Lawrence and Wishart: London, 1995) 350, in particular, at 375ff.

<sup>6</sup> Shaw, 'Twin-Track Social Europe - the Inside Track' in D. O'Keeffe and P. Twomey (eds) *Legal Issues of the Maastricht Treaty* (Wiley: Chichester, 1994) 295.

<sup>7</sup> Hepple, 'Equality and Discrimination' in P. Davies, A. Lyon-Caen, S. Sciarra, S. Simitis, *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn* (Clarendon Press: Oxford, 1996) 237 at 237.

<sup>8</sup> Shanks, 'Introductory Article: The Social Policy of the European Communities' 14 *CMLRev* (1977) 375.

Community norms - and subject to teleological interpretation by the European Court - contrasted starkly with the darkness of their highly technical UK equivalents, which were, in turn, subject to often restrictive interpretation by the UK courts. While resort to supranational equality norms and their more generous interpretation was always potentially there to provide arguments to circumvent unwelcome interpretations at national level or to force changes in national law, it seemed wholly plausible that the UK's record on sex equality - as in many areas of employment protection - must be one of the worst in Europe. It remained simply to demonstrate that contention. France seemed the obvious choice as a comparator country. It was, after all, France, which had succeeded in inserting Article 119 into the Treaty of Rome.<sup>9</sup> This seemed to clearly indicate that France would have a better record on sex equality than the UK. The original aim of this thesis was simply to show how other Member States, such as France, complied with their EC sex equality obligations in a more thorough going manner than the UK.

On the basis of existing UK materials, it seemed as if the basis for such a comparison was straightforward. In the UK, knowledge of sex equality law was readily available. Labour law textbooks contain large sections on sex equality laws, at national and supranational level. There is a steady supply of well reported cases and wide coverage of sex equality issues in academic journals. A rash of specialised monographs on sex equality law in the UK had appeared in the 1980s,<sup>10</sup> as had specialised monographs on EC sex equality law at the beginning of the 1990s.<sup>11</sup> The task appeared to be simply that of reading the books on French sex equality law, analysing the cases to see how French courts had dealt with issues such as equal value, direct and indirect discrimination and highlighting the unnecessarily restrictive and unacceptable approach the UK legislature and courts had taken.

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<sup>9</sup> See for accounts of the reasons for French insistence on the inclusion of Art. 119, Barnard, 'The Economic Objectives of Article 119' in T.K. Hervey and D. O'Keeffe (eds) *Sex Equality Law in the European Union* (Wiley: Chichester, 1996) 321 and Hepple *supra* at n.7 at 241ff.

<sup>10</sup> E. Ellis, *Sex Discrimination Law* (Gower: Aldershot, 1988), D. Pannick, *Sex Discrimination Law* (Clarendon Press: Oxford, 1985), R. Townshend-Smith, *Sex Discrimination In Employment: Law, Practice and Policy* (Sweet and Maxwell: London, 1989), K. O'Donovan and E. Szyszczak, *Equality and Sex Discrimination Law* (Blackwell: Oxford, 1988). More recent books on the topic include S. Honeyball, *Sex, Employment and the Law* (Blackwell: Oxford, 1991) and on anti-discrimination laws in general C. Bourn and J. Whitmore, *Anti-discrimination law in Britain* (Sweet and Maxwell: London, 1996).

<sup>11</sup> E. Ellis, *European Community Sex Equality Law* (Clarendon Press: Oxford, 1991), S. Prechal and N. Burrows, *Gender Discrimination Law of the European Community* (Dartmouth: Aldershot, 1990).



At the very least, this thesis illustrates the naivety of this belief. An initial examination of French materials showed that there were no articles - never mind monographs - examining the development of sex equality litigation in France. There was no easy way of finding out what cases had been decided, or how supranational sex equality sources emanating from the ECJ had been integrated into national understandings of equality. While a series of articles had been published at the time of the 1983 law which had implemented France's obligations under the equal treatment and equal pay directives, after that sex equality litigation discourse had vanished apart from some discussion focused solely on supranational level developments and a lively debate surrounding female night work and its relationship with an equal treatment norm. This was the opposite of the situation in the UK, where the interaction of national and supranational sources in litigation constituted a crucial dynamic and where the issue of female night work had been dealt with as straightforwardly incompatible with sex discrimination laws. Could it be said then that it was the UK which was 'advanced' in sex equality terms while France was 'backward', interested only in maintaining archaic and discriminatory protections rather than using sex equality legislation as a means of challenging and reshaping labour market norms?

To move on from this impasse requires rethinking what is meant by 'advanced' or 'better' and 'backward' or 'worse' in sex equality terms in France, the UK and at EC level. In particular, how is this superiority to be measured and evaluated? This rethinking provided the springboard for this thesis. A number of possible contenders emerge as means of measuring or evaluating sex equality, each of which requires examining how law attempts to ensure that the promise of equality is realised.

A first possible contender for evaluating how law tries to realise the promise of gender equality is to look at the laws which the three legislatures in this study - France, the UK and the EC - introduced in order to promote gender equality on the labour market. This is done in Chapter 1. These laws might be expected to contain similar features and, in view of French and UK obligations to conform with EC legislation in this area, to show a fairly high degree of uniformity. To some extent, this is true. The three legislatures can be thought of as each selecting a piece of legislative ground (the size can vary). Each can then select from a variety of equality seeds and plants (or cross-breed new strains) which can be placed in the ground. The selection, dispersal and

concentration of the seeds and plants will be planned by the legislature, perhaps influenced by their knowledge of the local climate and the soil. They may arrange for gardeners to tend the seeds and plants. The nascent equality concepts and techniques produced may then be used to attack or transform employment rules and practices. This will not be the case in the areas which each of the legislatures stakes out as being protected from interaction with these equality concepts and techniques.

Examining the variety of seeds they plant, the space given to different types of seeds to grow and the areas *a priori* excluded can give us some idea of how they expect the legislative ground they have sown to develop and allow us to evaluate these choices. While the French and British choices of legislative equality 'seeds' were to some extent circumscribed, or potentially subject to control by the EC, Member States retained a substantial degree of control, at least initially over the methods by which the substantive anti-discrimination guarantees they contained could be realised. Therefore, returning to Lord Wedderburn's advice, while it was clear that sex equality had developed very differently in France and the UK, the legal treatment of familiar social problems was not entirely 'unfamiliar' at the legislative level. Indeed the sex equality legislative maps in all three jurisdictions were very much like a 'family': there were many resemblances between the maps although each had its own distinctive characteristics.

The crucial point, of course, is to recognise that a comparison of legislation is a necessary but insufficient manner of ascertaining whether a legal treatment is 'familiar' or 'unfamiliar'. We can move on by considering that while EC equality norms did not exercise a high degree of normative control over the methods by which equality guarantees could be ensured, one method of allowing individuals to enforce equality rights was required by the equality directives: litigation. It was the unfavourable comparison of UK norms and litigation with their supranational counterparts which had initially prompted the writing of this thesis. With regard to litigation, the comparison with France certainly permits 'the stretching of the imagination and of the agenda'. It does this by challenging implicit assumptions on sex equality litigation from three perspectives: one from the 'top-down', one from the 'middle' and the other from the 'bottom-up'.

From the 'top-down', the focus is often on the fact that the ECJ has produced a substantial body

of jurisprudence as a result of a steady stream of references from national courts on Art. 119 and the equality directives over the last two decades. Yet even a preliminary glance at the situation in France promptly puts paid to a simple 'objectified' model of European integration in the area of sex equality; a model in which the ECJ acts 'on' the Member States and each judgment produced by the ECJ automatically flows into the national legal orders, provoking adjustments where necessary in each of these legal orders. No such flow occurs in France. This, in turn, makes the more systematic reception of ECJ judgments on sex equality in the UK legal order something to be explained and analysed rather than merely accepted. The conditions under which ECJ sex equality judgments are produced and circulate in the EC is a recurring theme throughout this thesis.

From the important perspective of using litigation to ensure congruence between national and supranational equality concepts and techniques, the development of the EC equality landscape is dependent on the Commission bringing infringement proceedings under Art. 169, or on national judges bringing a question concerning the interpretation of Community law before the ECJ. Given the limited resources of the Commission, the potentiality for congruence, conflict or ignorance between national and supranational concepts lies crucially with the national courts which occupy the 'middle ground' in this top to bottom analysis, and in the relationship which develops between national courts and the ECJ. Hence, an important part of this thesis will be to see when, how, why and on what issues *particular* national courts - with a specific (though not exclusive) focus on the UK and France - engage in dialogue with supranational sources. This cannot be done simply by counting the number of references to the ECJ, though this constitutes a specific and interesting type of dialogue.

From the 'bottom-up', it must be recognised that planting the legislative 'seed' of enforcement of equality rights through litigation does not mean that litigation will occur. Courts, whether national or supranational, cannot engage in dialogue with equality sources unless litigants come to court and present claims based on those sources. Therefore, for the line of dialogue between equality sources to be open, institutional conditions favouring equality litigation must be present. Compared with other employment rights, many substantive equality rights are delicate seeds and plants which require careful and sustained attention to flourish.

Chapter 2 of this thesis examines the 'bottom-up' perspective by analysing the institutional structures necessary to attain a threshold level of litigation with regard to a particularly delicate equality plant - equal pay for work of equal value. It explains why equal value should be perceived as a delicate plant, examines to what extent normal enforcement models have been modified to reflect this fact, and attempts to explain the factors underpinning the success or failure of these institutional modifications in stimulating and sustaining the growth of equal value. It also examines to what extent other types of institutional mobilisation around equal value take place most effectively in the shadow of litigation.

Chapter 3 examines chiefly the development of the concepts of direct and indirect discrimination by French and UK courts and by the ECJ. It seeks to ascertain what issues have been challenged using these equality concepts and how the courts have dealt with these challenges. It focuses on the courts as a crucial point of mediation for the development of equality sources - both national and supranational - and develops a typology of dialogue between national and supranational sources to compare and attempt to explain why different types of dialogue have occurred in the French and UK courts.

Comparing the substantive output of the ECJ with that of French and UK courts is important for another reason. While EC sex equality may be seen as a shining star in the European social policy firmament, this is, of course, a relative position which is largely determined by, on the one hand, the quality of the judgments of the ECJ on substantive (as opposed to procedural) equality concepts and, on the other, the paucity of other 'strong' social policy measures at EC level to combat vertical and horizontal inequalities on the labour market. The EC sex equality star will not necessarily shine so bright in the national legal orders for a number of reasons.

First, from a comparative perspective, the national courts may well be making a better job of interpreting equality sources than the ECJ itself. Hence, while the ECJ may at certain contingent points in time, or on certain issues, give the lead in courageously developing certain substantive equality concepts, it is by no means axiomatic that the national courts will always be playing 'catch up' with the ECJ. This theme is developed further in Chapter 3 and Chapter 6.

Second, commencing our examination of equality enforcement mechanisms at EC level leads to a focus on litigation, on the ECJ and on national courts. From a litigation perspective, Chapters 2 and 3 seek to demonstrate that sex equality is both less, and differently, developed in France than in the UK. However, to conclude that France has a less developed sex equality landscape than the UK on the basis of a comparison of the quantity and quality of litigation would be wholly inadequate. Neither the French nor the UK legislative maps limited the methods for realising gender equality to litigation by aggrieved individuals. What needs to be explained, by looking at the whole of the legislative map in each country, is which parts have flourished and why.

Chapter 4 tackles these issues. It makes the argument that to explain the different paths followed by the French and British legislative maps requires tracing what have been termed in this thesis the normative dynamics of equality strategies. This means that the emphasis placed on which equality strategies are pursued depends on the normative evaluation of what the problems facing women on the labour market are, and the best way of using law to tackle those problems. It further develops a typology of legal strategies which is given a preliminary outline in Chapter 2 in order to show what types of arguments may be made about how law may be used to improve the position of women on the labour market. Arguments about which strategy is better are often made in terms of 'formal' and 'substantive' equality. Chapter 4 makes the claim that the meaning of formal and substantive equality, in terms of the privileging of different types of equality strategies, is context-dependent. It seeks to demonstrate that in France, litigation is viewed *per se* as formal whilst in the UK, re-evaluation of the jobs and forms of female employment through litigation is seen as substantive. It attempts to explain why this is the case by examining the context-dependent evaluation of different equality strategies.

Chapter 4 goes on to examine one equality strategy which is often regarded as the essence of substantive equality: positive action. It challenges this facile labelling by examining the reality of positive action in France and the UK. It also challenges the equally facile labelling of positive action as anti-equality by critically analysing developments at EC level on positive action, in particular, the ECJ judgment in *Kalanke*. This judgment is also an example *par excellence* of the EC's sex equality star shining less brightly when placed in certain national contexts.

The third reason which may affect how brightly the EC sex equality star shines is the general landscape at national level, not only of sex equality laws, but of labour law more generally. In other words, the argument is that resort to sex equality laws may depend on the level of employment protection provided for particular groups of workers. Where adequate protection is already provided, the need to resort to exploiting sex equality norms to obtain protection may be seen as less pressing. Chapter 5 compares pregnancy protection and post-birth regulation in France, the UK and the EC from this perspective. There can be little doubt that some of the explanation for the prominence of sex equality and the privileging of supranational recourse in the UK is the poverty of labour law protection.

Examining the relationship between strategies to combat horizontal inequalities (such as gender inequalities) with strategies to combat vertical inequalities is crucially important for two other reasons. First, as both Chapter 5 and Chapter 6 seek to demonstrate, both types of strategies could and should continually be informing each other. Chapter 5 argues that to attempt to forge pregnancy protection and post-birth regulation solely out of sex equality provisions is just as unsatisfactory as attempts to jettison equality arguments and forge 'independent' labour law regulation of pregnancy and the post-birth period.

Chapter 6 uses the example of female-specific night work regulation to argue that none of the three jurisdictions examined in this thesis - France, the UK or the EC- have adequately articulated sex equality (horizontal equality) with labour law (vertical equality). It examines the fate of night work norms from two perspectives. First, this is the only sex equality issue around which there has been a high degree of institutional mobilisation and supranational dialogue in France. By contrast, this is the one area of sex equality in the UK where supranational developments aroused little to no attention. Discussions on female night work regulation also add a few new twists to arguments on dialogue between sources - as they are intimately entwined with international labour norms and a further type of dialogue, that between courts and other institutional actors, such as legislatures, governments and unions. Secondly, it is argued that examination of the fate of female-specific night work norms in several EC jurisdictions - including France, the UK, Italy, Germany and Belgium - as well as the treatment of female night work regulation at EC level reveals that the meaning of gender equality itself is dependent upon its degree of articulation with

labour law protection and the conceptual apparatus of labour law.

One final comment is that no apology is made for the fact that this thesis makes no attempt to be value-free. It is written in the firm belief, which surely needs no justification, that gender inequality is a societal wrong and that law has a role, albeit limited, to play in addressing that wrong. Therefore, laws and judicial interpretations of those laws will be criticised throughout this thesis from that perspective.

# Chapter 1

## Legislative maps

### 1. United Kingdom

#### 1.1 The two Acts

UK equal treatment law is organised around two main statutes, the Equal Pay Act 1970 (as amended, hereafter EqPA) and the Sex Discrimination Act 1975 (as amended, hereafter SDA). Both Acts came into force in 1975. The seeds planted in these pieces of legislation were little influenced by Community provisions and, as Paul Davies has pointed out, 'the main foreign influences on the UK legislation were clearly from the US'.<sup>1</sup> Despite their titles, the EqPA does not solely deal with terms and conditions relating to pay. The line drawn between the coverage of the Acts is that one (the EqPA) deals with equalising contractual terms and conditions of employment (express or implied) whilst the other (the SDA) deals with other types of treatment deemed discriminatory by the SDA itself. The two Acts are designed to form two halves of a whole and are mutually exclusive. This distinction between what falls within the purview of the EqPA and SDA respectively is laid out in s.8 SDA. The main area of potential overlap in designing these Acts was the situation where the conditions on which terms and conditions of employment were *offered* (covered by the SDA) would, if they were *actual* terms and conditions of employment, contravene the EqPA. The SDA resolves this by stating that if the terms and conditions on offer were accepted, they would breach the EqPA, they shall be taken to be a breach of the SDA (s.8(3)). If on the other hand, they would, if accepted, breach the EqPA, but for the fact that s.1(3) EqPA would save the terms and conditions, they shall not be taken to contravene the SDA (s.8(4)). Having provided a mechanism for resolving under which Act

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<sup>1</sup> Davies, 'European Equality Legislation, UK Legislative Policy and Industrial Relations' in C. McCrudden (ed.) *Women, Employment and European Equality Law* (Eclipse Publications: London, 1987) 23 at 36.



proffered terms and conditions should fall, s.8(5) SDA goes on to make it clear that the SDA cannot be invoked as a legal basis for challenging actual terms and conditions. The correct legal basis in these cases is the SDA. The two Acts are to apply to both public and private sector employees, subject to the exceptions outlined below.

## 1.2 The principle of symmetry

Both Acts contain provisions making it clear that the Acts apply equally to both men and women.<sup>2</sup> Both specifically exempt provisions affording special treatment to women in connection with pregnancy and childbirth.<sup>3</sup>

## 1.3 Equal Pay Act: basic design

The EqPA operates (s.1(1)) by deeming all employment contracts in Great Britain<sup>4</sup> to contain an equality clause. This clause will operate if a woman can fit inside one of three boxes defined in s.1(2) EqPA: like work, work rated as equivalent or work of equal value.<sup>5</sup> Having placed herself in one of these boxes, the woman may find herself in one of two situations according to the Act: (i) she lacks a term in her contract which benefits a man; (ii) a term in her contract is or becomes less favourable than that of a man in the same employment.<sup>6</sup> The equality clause has the effect that her contract shall be treated as (i) including the term or (ii) modifying the less favourable term so

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<sup>2</sup> s.1(13) EqPA and s.1(2) SDA.

<sup>3</sup> s.2(2) SDA, s.6(1)(b) EqPA.

<sup>4</sup> In Northern Ireland, the equivalent legislation is the EqPA (Northern Ireland) 1970.

<sup>5</sup> C. McCrudden, *Equality in Law between men and Women in the European Community: United Kingdom* (Martinus Nijhoff: Dordrecht, 1994) 13 states that there are four basic concepts in the area of equal pay; 'like work', 'work rated as equivalent', 'work of equal value' and 'discrimination'. It is important to underline that the word 'discrimination' is not used in the EqPA and any use of this word in relation to claims under this Act are due to its importation from elsewhere.

<sup>6</sup> 'Same employment' is a term of art which is given an exhaustive definition in s.1(6)(c). This states that 'men shall be treated as in the same employment with a woman if they are men employed by her employer or an associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions are observed either generally or for employees of the relevant classes'. Associated employer also falls to be defined in this section: 'two employers are to be treated as associated if one is a company over which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control.' See further Chapter 2 at n.76 and accompanying text.

that it is no longer less favourable. The equality clause will operate unless the employer proves that the variation between the woman's contract and the man's contract is genuinely due to a material factor which is not the difference of sex (s.1(3)). Claims under the EqPA are to be brought before Industrial Tribunals (s.2(1)) not more than six months after the end of employment (s.2(4)). In the event of a successful claim, the term will be introduced or modified accordingly, and the Tribunal may award back pay and damages for up to two years before the date on which proceedings were instituted under the Act (s.2(5)).<sup>7</sup>

#### **1.4 Sex Discrimination Act: basic design**

The SDA 1975 is by far the bulkier of the two statutes. The EqPA has eleven sections, the SDA 87, plus four Schedules. The SDA is divided into eight parts. Part I (ss.1-5) sets out definitions of discrimination while Part II (ss.6-16) sets out, in the employment field, the acts and actors to which these definitions of discrimination can be applied.<sup>8</sup> Part IV (ss.37-42) establishes the unlawfulness of certain acts (and liability for these acts) not thus far covered by the legislation. Part V sets out exceptions to the application of Parts II-IV. Part VI deals with the establishment of the Equal Opportunities Commission (EOC) while Part VII is devoted to enforcement.<sup>9</sup> The legislative turf is broadly carved into three similarly-sized areas: individual enforcement, institutional enforcement and exceptions.

##### **1.4.1. Individual enforcement**

The central feature of the individual litigation provisions of the SDA is to connect the definitions of discrimination set out in s.1 with one of the acts defined in Part II, carried out by a person defined in Part II. Two definitions of discrimination are set out in s.1 and these are now called, though they are not termed as such in the SDA, 'direct discrimination' and 'indirect discrimination'. It is worth setting out this provision in full:

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<sup>7</sup> Other procedural modification in respect of equal value cases are discussed in Chapter 2 at Section 5.3.

<sup>8</sup> Part III deals with discrimination outside the employment field in certain defined areas, such as education, goods and services.

<sup>9</sup> Part VII is entitled supplemental and includes, for example, a long interpretation section.

1(1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if

- (a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or
- (b) he applies to her a requirement or condition which applies or would apply equally to a man but-
  - (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
  - (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
  - (iii) which is to her detriment because she cannot comply with it.

S.1(1)(a) is termed 'direct discrimination' and s.1(1)(b) 'indirect discrimination'. A similar definition concerning married persons is contained in s.3, and s.4 sets out a definition of discrimination by way of victimisation. S.5(3) states that 'a comparison of the persons of different sex or marital status under s.1(1) or 3(1) must be such that the relevant circumstances in the one case are the same, or not materially different'. Unlike the situation under the EqPA, a comparator can be hypothetical.

These definitions do not in themselves establish any contravention of the Act and must be read in conjunction with a provision in one of the other parts of the Act. In the field of employment, the most important are contained in s.6(1) and (2). The articulation with the s.1 definitions of discrimination can be seen clearly if we take as an example s.6(2)<sup>10</sup> which makes it unlawful for a person, in the case of a woman employed by him at an establishment to discriminate against her (a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them or (b) by dismissing her, or subjecting her to any other detriment. The provisions set out in Part II read with those in Part I are designed to be enforced by individuals before Industrial Tribunals (hereafter ITs). These individually litigable provisions make up approximately one third of the ground occupied by the SDA.

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<sup>10</sup> S.6(1) deals with hiring and offers of employment. Part II of the Act also covers discrimination by bodies other than employers dealing with *inter alia* partnerships (s.11), trade unions (s.12), qualifying bodies (s.13), persons concerned with the provision of vocational training (s.14) and employment agencies (s.15). Under Part IV of the Act, s.41 deals with the situation where it is an employee who discriminates against another employee. The employer will be liable if it was done in the course of employment but the employer has a defence if he can prove that he took reasonably practicable steps to prevent the employee from doing the act, or from doing in the course of his employment acts of that description. See further Chapter 3 at Section 2.3.2.

### 1.4.2 Institutional enforcement

Another third is devoted to setting up the EOC (Part VI SDA). This part of the Act sets out its duties<sup>11</sup> and powers. While s.75 grants the EOC the power to assist individual litigants, a much greater part of the Act is devoted to giving the EOC various powers to be an institutional enforcer in its own right. Acts which are within the sole remit of the EOC fall within Parts IV, VI and VII of the Act. Part IV sets out a number of discriminatory acts which can only be judicially enforced by the EOC.<sup>12</sup> Part VI contains a number of provisions permitting the EOC to engage in formal investigations (ss.57-61) against persons which it believes are contravening the EqPA or those provisions of the SDA which can only be judicially enforced by the EOC (which I will call 'formal investigation prescribed acts'). It gives the EOC wide-ranging powers to obtain information from persons<sup>13</sup> under investigation and to issue recommendations as a result of this formal investigation. Part VII also gives the EOC the power to issue non-discrimination notices (s.67). These can require persons who the EOC, in the course of a formal investigation, is satisfied has or is committing a 'formal investigation prescribed act', not to commit such acts and where compliance involves changing existing arrangements, to inform the EOC that those changes have been carried out. A non-discrimination notice in the employment field is subject to appeal to an IT by the person to whom it is addressed (s.68). Finally, the EOC can obtain injunctions from the County Court to prevent a persistent discriminator from breaching the individual complaint provisions of the EqPA and the SDA. A persistent discriminator is an employer who has, in the last five years, had a non-discrimination notice served on him or her or has been found to have breached the SDA

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<sup>11</sup> These include *inter alia* on a general level working towards the elimination of discrimination, promoting equality of opportunity between men and women, keeping the act under review (s.1). More specific duties include the review of discriminatory provisions of health and safety legislation (s.55; see *infra* Chapter 6 at n.49); production of an annual report (s.56).

<sup>12</sup> See ss.37-40 SDA. These include, for example, taking proceedings against those who publish discriminatory advertisements and action against those who place pressure on others to discriminate.

<sup>13</sup> If a person under investigation fails to comply with a notice issued by the EOC to obtain information, the EOC may apply to the County Court for an order requiring him to comply. Failure to comply with this order is subject to a penalty (s.59(4)). The altering or concealing of documents required by a notice or order or the making of false statements by the investigated person is a summary offence (s.57(6)). On formal investigations, see further Chapter 4 at Section 4.2.1.

or the EqPA in an individual complaint to an Industrial Tribunal (s.71).<sup>14</sup>

### 1.4.3 Exceptions

The final third of the Act is devoted to exceptions, exemptions and exclusions. S.7 SDA sets out the situations in which being of one sex is a genuine occupational qualification. The design of this section is that of a long, detailed list which currently<sup>15</sup> sets out no fewer than eight exceptions.<sup>16</sup> Part I of the Act also includes two other exclusions, s.5, and, more importantly, s.6(4). S.6(4) originally provided that the provisions of s.6 did not apply in relation to death or retirement. This was amended in 1986 by SDA 1986 s.2(1) to bring certain acts (including dismissal) back within the scope of s.6 of the SDA.<sup>17</sup> Part II of the Act contains three exclusions which concern police officers, prison officers<sup>18</sup> and religious ministers.<sup>19</sup> The Act does not apply to the naval, military or air forces of the Crown (s.85).<sup>20</sup> Apart from these exceptions, an entire Part of the SDA (V)

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<sup>14</sup> As s.71 requires a finding by an IT of an unlawful act before the EOC can go to the County Court, s.73 gives the EOC the opportunity to go first to the IT to obtain such a finding. Such a finding will be treated as conclusive by County Courts or by ITs presented with a complaint by the person affected by the act pursued by the EOC under s.73.

<sup>15</sup> This section has been amended (see now s.7(2)(ba)) as a result of Art.169 proceedings against the UK, Case 165/82 *Commission v UK* [1983] ECR 3431 which resulted in the removal of the small-employer exception (former s.6(3) repealed by SDA 1986, s.1) and narrowed the 'private home exception'. S.7(2)(f) which exempted from the discrimination principle any 'job which needs to be held by a man because of restrictions imposed on the employment of women' has been repealed; see *infra* Chapter 6 at n.65.

<sup>16</sup> Without giving the full text, these are, (a) the dramatic performance exception [for example, lawful to exclude auditioning men for the role of Lady Macbeth] (b) the decency exception (ba) private household exception (c) the sleeping exception [job-holder must live in premises provided by employer, no accommodation or sanitary facilities for those of opposite sex, not reasonable to expect employer to provide them] (d) hospital/prison exception [persons requiring special care, supervision, persons are all men, reasonable that job should not be held by a woman] (e) provider of personal welfare services (f) [repealed] (g) 'Saudi Arabia' exception [not appointing a woman for a post which requires working in a country where it is culturally unacceptable for women to do that job] (h) job is one of two to be held by a married couple.

<sup>17</sup> See further Chapter 3 at Sections 2.1, 2.2.3 and 2.3.5.1.

<sup>18</sup> S.17 and s.18 SDA provide that certain requirements relating *inter alia* to sex-based minimum height requirements for police and prison officers are not rendered unlawful by the Act

<sup>19</sup> S.5 SDA and s.19 SDA both concern religious exceptions. S.5 exempts discrimination in connection with educational appointments where this is necessary to comply with any requirement relating to the establishment that its head teacher should be a member of a particular religious order. S.19 excludes discrimination for the purposes of an organised religion where employment is limited to one sex to avoid offending the doctrines of the religion or to avoid offending the religious sensibilities of a large number of followers.

<sup>20</sup> See further Chapter 3 at Section 2.3.5.7.

is devoted to 'General Exceptions from Parts II-IV'. These include an exception for charitable instruments (s.43), communal accommodation (s.46), acts done for the protection of women (s.51)<sup>21</sup> and acts safeguarding national security (s.52). Sandwiched between these provisions are three sections, ss.47, 48 and 49 which allow for certain closely defined types of positive action. The sections are organised in a similar manner: s.47 addresses vocational training bodies, s.48 addresses employers, employers' organisations and trade unions and s.49 addresses employers' organisations and trade unions.

Under s.47, training bodies (which may include employers) may provide access to training to (i) women only (ii) men only (iii) persons who are in special need of training by reason of the period for which they have been discharging domestic or family responsibilities to the exclusion of regular full-time employment. In relation to (i) and (ii), sex-specific training is only permitted where it reasonably appears that in the preceding year there were no persons of the sex in question doing that work within Great Britain (or a part thereof) or the number of persons doing the work was comparatively small. The provision does not apply to any discrimination rendered unlawful by s.6 SDA. S.48 permits employers to train employees of one sex and encourage non-employees of a sex to apply for jobs where different underrepresentation criteria from those in s.47 are met.<sup>22</sup> S.49 makes it lawful for employer' organisations and trade unions, which have an elected or mainly elected membership, to have a provision which ensures that a minimum number of seats are reserved for members of a particular sex by reserving seats or making extra seats on the body available where, in the opinion of the organisation, the provision is in the circumstances needed to secure a reasonable lower limit to the number of persons of that sex serving on the body. The section goes on to state that it shall not be taken as making lawful discrimination in the arrangements for determining the persons entitled to vote in an election of members of the body, or otherwise to choose the persons to serve on the body, or discrimination in any arrangement concerning membership of the organisation itself.

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<sup>21</sup> S.51 SDA was amended in the Employment Act 1989 (see *infra* Chapter 6 at n.66) and now provides that nothing in the SDA renders discriminatory any act done by a person in relation to women if necessary for that person to do it in order to comply with a requirement of an existing statutory provision having effect for the purpose of protecting women as regards pregnancy and maternity. See in the EqPA s.6(1)(b).

<sup>22</sup> For more detailed discussion of ss.47-48, see Chapter 4 at Section 5.1.1.1.

## 2. France

Unlike the UK, France has added new pieces to its legislative sex equality map over the last half century, commencing with the declaration in the Preamble to the French Constitution of 1946 that, 'la loi garantit, à la femme, dans tous les domaines, des droits égaux à ceux des hommes'. However, as the main equality provisions which have gradually accumulated are codified in the Labour Code and were placed in a coherent legal framework by the 1983 'Loi Roudy'<sup>23</sup> (as amended), this law, which constitutes the centre-piece of French legislative provisions in this area, will be our primary focus. Ancillary provisions, which support the edifice of the 1983 Law, will be referred to when appropriate.

A more important difference between France and the UK is that not all employees are covered by the equality provisions in the Labour Code. Public servants are covered by separate legislation and justiciable issues go, not to the civil, criminal and administrative courts, but solely to the administrative courts, which have made extensive use of the constitutional equality guarantee. These will be considered after an outline of the organisation of the Labour Code provisions.

The 1983 law was seen, not just as introducing some extra provisions in the field of sex equality, but as reconceptualising the legislative treatment of men and women in employment.<sup>24</sup> Prior to 1983, legislative provisions had utilised the categories of equal pay and equal treatment. The 1983 Law introduced a new term - employment equality (*égalité professionnelle*). While there is no definition of 'employment equality', it is clear from the design of the law that it has two components: (a) equal rights and non-discrimination (b) equal opportunities. The Law hinges around the distinction between these two components.

### 2.1 Equal rights and non-discrimination

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<sup>23</sup> Law No.83-635 of 13 July 1983, JO 14 July 1983, p.2176. It is dubbed the Loi Roudy because of the influence Yvette Roudy had in designing it and ensuring its passage into law.

<sup>24</sup> Unlike the SDA 1975, the French law covers only employment. A further difference between the British and French provisions is that EC intervention (the commencement of Art.169 proceedings by the Commission in 1979 which were subsequently withdrawn in the light of the appearance of a draft law) played a large role in pushing the legislature towards formulating what became the 1983 law.

This can in turn be broken down into non-pay issues and pay issues, though the division is not one of mutual exclusion as in the SDA 1975. The former are located in Art.L-123-1 c. trav. and the latter in Art.L. 140 c. trav.

### 2.1.1 Art.L.123 c.trav.

The general anti-discrimination clause is contained in Art.L. 123.-1<sup>25</sup> which states:

With the exclusion of the provisions of the present Code and unless the sex of the worker constitutes a determining factor for the exercise of a job or an employment activity no one shall:

- (a) mention or cause to be mentioned in an offer of employment, whatever the type of employment contract envisaged may be, or in any other form of publicity relating to hiring, the sex or family situation of the candidate;
- (b) refuse to hire a person, transfer them, terminate or modify their contract of employment on the ground of sex or family situation or on the basis of criteria which differ according to sex or family situation;
- (c) take sex into consideration when taking any measure, particularly in the field of pay, qualifications, classifications, promotions or transfers.<sup>26</sup>

Breaches of Art. 123-1 give rise, in addition to compensation of the victim, to a series of sanctions which are unfamiliar in the British system. All breaches of this provision shall be punished by one years' imprisonment and a fine of 25 000 F, or one of these sanctions only.<sup>27</sup> The judge can also order, at the discriminator's expense, the judgment to be publicly placed in the enterprise or printed in newspapers.

Of most interest is a provision which provides the only potentially obligatory link between the equal rights provisions and the equal opportunities provisions in the 1983 Law. The judge has the power, before applying any of these sanctions, to order the discriminating employer back to the

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<sup>25</sup> This replaced a previous 1975 provision (Art.11 Law 11 July 1975) codified as Art.416 Penal Code which forbade discrimination in hiring and dismissal only and provided a defence for an employer with a 'legitimate motive'. See also Art.L.900-5 c.trav which outlaws discrimination in training, subject to the exception where sex is a determining factor.

<sup>26</sup> Since 1992, Art.L.123-1 has also included a provision prohibiting any person from taking any measures (in eg hiring, pay, training, dismissal etc..) against a person who has been subjected, or has refused to be subjected to, *sexual harassment* (given a specific definition in Art.L 122-46) or has been a witness to such harassment. See further Chapter 4 at n.30.

<sup>27</sup> Art.L.152-1-1 c. trav.



enterprise to define, within a period laid down by the judge, and following consultation between the employer and the enterprise committee or staff delegates, measures to restore employment equality between men and women in the enterprise. This order may also require the employer to have carried out these measures within a specified period. At the end of the deadline set out in the order, the employer comes back before the judge who can decide whether or not to apply the normal sanctions, or to provide a further period in which the employer can define or carry out measures to restore employment equality.<sup>28</sup>

The exclusions in the Labour Code are discussed, *infra*, in Chapter 6. Situations in which sex is a determining factor, are, according to Art.L.123-1, to be issued in a decree and determined after having the opinion of both sides of industry. The Decree sets out three exceptions: artists called upon to play a male or female role, mannequins and male and female models.<sup>29</sup> Art.L.123-2 makes it unlawful for collective agreements to contain clauses which benefit one sex only, unless they concern specific provisions in the Labour Code relating to pregnancy and maternity. The sanction is nullity.<sup>30</sup> Art.L.123-5 makes the dismissal of an employee, on the grounds that she has taken legal proceedings to enforce any of the employment equality provisions, of no effect and makes re-instatement of the employee a right. She can choose whether to exercise this right or obtain compensation.<sup>31</sup>

### 2.1.2 Art.L.140 c.trav.

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<sup>28</sup> Art.L.152-1-2 and Art.L.152-1-3 c. trav. Art.154-1 c.trav. makes these applicable to infringements of equal pay under Art.L.140-2 to Art.140-4 c.trav.

<sup>29</sup> Decree No.84-395 of 25 May 1984.

<sup>30</sup> This follows an amendment to this provision in 1989 (Law no.89-488 of 10 July 1989, art.8) which abolished the saving clause for sex-specific collective provisions in force before 1983. The removal in 1989 followed the condemnation of this clause in *Case 312/86 Commission v. France (Re Protection of Women)* [1988] ECR 6315. See further, *infra*, Chapter 3 at n.192, Chapter 4 at Sections 5.1.3.2 and 5.1.3.3, Chapter 5 at n.172 and Section 5.3.1 and Chapter 6 at n.41.

<sup>31</sup> See also provisions inserted in the Auroux Laws which can be seen as antecedents, or complements, to the 1983 provisions. In the field of non-discrimination and equal rights, see Art.L.122-35 which states that work rules cannot contain provisions injuring employees in their employment, on the grounds of their sex, family situation, origins, opinions or beliefs and Art.L.122-45 which states that 'no employee can be disciplined or dismissed because of their origin, sex or family situation'. Both provisions come from Law 4 August 1982, which is concerned with freedom of workers in the enterprise.

This is discussed in Chapter 2 as are enforcement issues which apply to all equal rights and non-discrimination provisions. For present purposes, it is sufficient to note, for the purposes of comparison, the emphasis placed on the trade union role in equal rights enforcement and the lack of agency enforcement powers.

### **2.1.3 Equal opportunities**

Equal opportunities provisions take up most of the 1983 Law and are, undoubtedly, at the heart of the French legislative map. The realisation of equal opportunities has three chief legislative ingredients: (i) informational requirements, including an annual report requirement; (ii) temporary 'catch-up' measures by employers, bargaining partners and training bodies; and (iii) employment equality plans.

#### ***2.1.3.1 Informational requirements***

Informational requirements are dealt with in two ways. First, the requirement to give employment equality information may be 'built in' as one of a number of requirements in an area not specifically dealing with employment equality. This is most obvious in the set of laws known collectively as the *Lois Auroux* which introduced a wide-ranging reform of legislative regulation of employment in 1982. Thus the Law of 28 October 1982, which deals with the development of institutions representing the workforce introduces in Art.L.432-4 c.trav. a requirement for the employer to submit a report on the enterprise's financial situation to the enterprise committee at least once a year. Paragraph 3 of this provision requires the report to include the development of average hourly and monthly wages by sex.

Further requirements for the employer to give information to the enterprise committee can be found in Art.L.432-4-1c.trav. This requires the employer *inter alia* to retrace, month by month, the evolution of the number and qualifications of employees by sex, indicating the number of employees on permanent contracts, the number on fixed-term contracts and the number of part-

time employees.<sup>32</sup>

The final piece of legislation which incorporates a 'sex equality information' dimension was introduced by the Law of 13 November 1982, which concerns collective bargaining and the regulation of industrial conflict, now codified in Art.L.132-38 c.trav. This states that in the first meeting of the annual obligation for unions and employers to negotiate at enterprise level (itself introduced by this Law), the employer must provide the trade union representatives with information which allows a comparative analysis of the situation of men and women in the field of jobs, qualifications, pay, hours worked and the organisation of working time. Furthermore, the information must make clear the reasons for the situation revealed by these statistics.

Second, these informational and analysis requirements in the area of sex equality were consolidated in the requirement under the 1983 law for employers in enterprises with at least 50 employees to present to the enterprise committee each year a written report on the comparative situation of men and women in the enterprise.<sup>33</sup> The first part of the report is of an informational nature and requires a statistical breakdown of seven areas enumerated within the law including qualifications, job classifications and pay. The second part of the report requires employers to record the measures taken in the enterprise in the previous year towards attaining employment equality, and an outline of the objectives for the year ahead - including a quantitative and qualitative definition of the measures to be taken as well as an evaluation of their cost. The enterprise committee may add their opinion to the report which must then be transmitted to the work inspector within a fortnight and given to any employee who requests a copy.

A further incentive to the production of sex equality information is found in Art.L.123-4-1, added to the Labour Code in 1989. This provides that enterprises with fewer than 300 employees can conclude an agreement with the State to receive financial assistance in order to carry out a study of their employment equality situation and of the measures, such as those set out in Articles

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<sup>32</sup> This requirement derives from Law No.90-613 of 12 July 1990 (apart from the requirement to give the information on part-time employees which derives from Law No.92-1446 of 31 December 1992). Employers with 300 or more employees must provide this report every three months; other enterprises with an enterprise committee (ie those with 50 or more employees) must provide a report on a bi-annual basis.

<sup>33</sup> Art.L.432-3-1 c.trav.

L.123-3 and L.123-4, which it would be appropriate to take to re-establish equal opportunity between men and women.<sup>34</sup>

### *2.1.3.2 Temporary 'catch up' measures*

#### Employers

The legislative antecedent to the temporary measures which dominate the 1983 law is to be found in Law 13 November 1982, codified as Art.133-5-al.9. This provision requires branch level agreements, in order to be extended, to include a provision concerning:

employment equality between employees of both sexes and 'catch-up' measures tending to remedy inequalities which have been ascertained. Employment equality applies in particular to access to jobs, training, promotion and to job and work conditions.

The 1983 law builds on and extends these concepts. The first paragraph of Art.L.123-3 closely mirrors the wording of Art.2(4) of the Equal Treatment Directive. The second paragraph goes on, however, to situate these measures more closely in the context of the French legislation:

The provisions of Arts.L.123-1 and L.123-2 shall be without prejudice to temporary measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities.

The measures envisaged above may result from regulatory provisions in the areas of hiring, training, promotion, organisation and conditions of work or in application of the provisions of 9o Art L.133-5 [discussed above] or in application of the provisions of Art.L.123-4 [discussed below].

#### Bargaining partners

In 1989, a new provision was inserted into Art.L.123-3 of the Labour Code by a law dealing principally with economic dismissals<sup>35</sup> This lays down an obligation for bargaining partners who

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<sup>34</sup> The precise conditions for this financial assistance are set out in Decree No.92-353 of 1 April 1992 (see Art.D.123 c.trav.). This states that each agreement will fix the aim, content, deadline for completion and conditions of circulation of the report, as well as the amount of financial assistance. This financial assistance can cover at most 70% of the expenses incurred and can never exceed 70 000 F. The enterprise committee, or where none exists, the enterprise delegates receive the report and are consulted on how to follow it up. Trade union representatives also receive the report. The report and the opinions received are also communicated to the Departmental Labour Director.

<sup>35</sup> Law No.89-549 2 August 1989, Art.37. This is the penultimate article in a Part entitled 'Various provisions'.

are bound by a branch level agreement to meet specifically for the purpose of negotiating measures to promote employment equality between men and women and 'catch up' measures aiming to remedy ascertained inequalities. It further sets out areas which these negotiations should particularly focus on: conditions of access to employment, training, promotion, and working conditions.

### Training

Art.L.900-5 of the Labour Code states that the general rule outlawing discrimination does not prevent transitory measures, for the benefit of women only, which aim to establish equality of opportunity between men and women. In particular, this provision applies to measures which aim to correct imbalances which are to the detriment of women in the repartition of men and women in training programmes.

It is important to note that these equal opportunities provisions are, unlike in the UK legislation, *asymmetrical*. They apply only to measures to improve the position of women on the labour market.

#### *2.1.3.3 Employment equality plans*

These are the jewel in the crown of the 1983 Law, pulling together all the elements of innovation in the new conceptual design of *égalité professionnelle*. This new design aims to empower institutions at enterprise level and the bargaining partners at all levels by providing informational tools, a legislative stamp of approval for 'catch up measures' and the space to negotiate employment equality in a voluntary framework which is backed up by the possibility of financial incentives rather than by sanctions.

The legislative terrain for employment equality plans is set out in Art.L.123-4 c.trav.:

To ensure employment equality between men and women, in view particularly of the report established by Art.L.432-3-1 of this Code, the measures outlined in Art.L.123-3 can be the object of an employment equality plan between men and women negotiated in the enterprise...

If, at the end of negotiation, no agreement has been reached, the employer can implement such a plan, on condition that he has previously consulted and received the opinion of the enterprise committee, or where none exists, of the enterprise delegates. This plan is applicable, unless the Departmental Labour Director declares his opposition in a written reasoned opinion within a period of two months from the date on which he received the plan.

The provision goes on to offer financial inducements to enterprises which introduce plans, particularly those concerned with training, promotion and work organisation which constitute 'exemplary actions' for realising employment equality. The conditions under which this financial assistance shall be given to employment equality plans are further elaborated in a Decree of 1984.<sup>36</sup>

#### **2.1.4 Employees of nationalised enterprises and public servants<sup>37</sup>**

Employees of nationally owned enterprises form a sort of employment law hybrid between employees in private enterprises and public servants. While these employees are normally subject to the provisions of the Labour Code, the statutes of these enterprises may be challenged before the administrative courts within a period of two months following their promulgation. Following this date, the statute can no longer be annulled. However, a provision in a statute which contravenes equal pay or equal treatment provisions can be challenged by the employee before the ordinary courts. If this happens, the judge must send the matter to an administrative judge for

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<sup>36</sup> Decree No.84-69 of 30 January 1984. This Decree specifies that the employer and the State will contribute equally to the costs of financed actions. It also states that the actions financed must have the aim of effecting a 'significant improvement' in the place of women in the enterprise. Financial assistance will only be granted following the conclusion of a 'Contract for Employment Equality in the Enterprise' between the State and the employer and the decree sets out the standard terms of this contract (Art.3). The minister responsible for women's rights, after receiving the opinion of a commission made up of representatives of other ministries, will conclude the contract. A employment equality mission will be set up to facilitate the administration of the work of the minister responsible for women's rights and the commissioner (Art.4) The State can take the money back where the employer fails to fulfil their side of the bargain (Art.8).

<sup>37</sup> Very little information on equal treatment in the French public service is available. In writing this section, I have drawn on the following sources: M-T. Lanquetin, C. Sutter and C. Pettiti, *Les délais et prescriptions applicables en matière d'égalité de traitement et de rémunération entre les hommes et les femmes: le régime juridique français* (1990), unpublished report submitted to the EC Network of Equality Law Experts; Auvret, 'L'Egalité des sexes dans la fonction publique', *Revue du Droit Public* (1983) 1571; Bonichot, 'Egalité des sexes, recrutements distincts et droit communautaire', *Revue française du droit administratif* 4 (1988) 976.

determination.<sup>38</sup>

Public servants are not covered by the Labour Code. Instead, their employment conditions are governed by specific laws, decrees and *arrêtés*. Those which contravene equal pay or equal treatment may be challenged before the administrative courts. Public servant status embraces a broad category of workers, such as prison officers, the police force and teachers. A public servant who wishes to challenge a potentially discriminatory decision can make use of two types of challenge. The first involves asking the part of the administration which made the decision to reconsider their decision. Thus, a teacher would ask the Minister of Education. This is known as a *recours gracieux*. The administration has four months to reply. This reply (or a failure to reply, which is treated as a reply) may then be challenged before a *Tribunal administratif* in what is known as a *recours hiérarchique* which can ultimately be decided upon by the *Conseil d'Etat*.

The legal provision governing equal treatment for public servants has a long history. Its origins are to be found in Art.7 of the Law of 19 October 1946 which stated that 'no discrimination shall be made in the application of this statute between the two sexes, except for the special provisions it lays down.' This provision was the subject of an important decision by the Conseil d'Etat on 16 January 1956.<sup>39</sup> The supreme administrative court combined Art.7 and the affirmation of sex equality in the Preamble of the Constitution to derive a general principle of law of equality of male and female public servants. Derogations could only be introduced where the 'conditions of exercise of these functions require such derogations'. Art.7 was reformulated in 1959 and in 1975 to gradually limit the numbers and the manner in which categories of public servant could be excluded from the principle of equal treatment. Following the 1975 law a decree in 1977, which underwent some modifications, set out five corps which had solely male recruitment, two with solely female recruitment and eighteen which had recruitment and conditions of access which were specific to each sex.

The European Commission, in a Reasoned Opinion addressed to France in 1981 stated that Art.7

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<sup>38</sup> For a wide ranging analysis of employment equality in publicly owned enterprises see J. Rualt, *L'égalité professionnelle dans les entreprises à statut réglementaire*, rapport réalisé pour le Conseil économique et social, March 1989.

<sup>39</sup> *Syndicat nationale autonome du cadre d'administration générale des colonies et sieur Montlivet*.

(in its 1975 version) did not respect the provisions of the Equal Treatment Directive. Another law was then passed in 1982 to bring the law into line with EC obligations. This law, which currently governs equal treatment between the sexes in the public service, retains the basic formulation that no discrimination shall be made in the application of this statute between men and women, but changes the formulation of how exceptions can be introduced by requiring sex to be a determining factor. Decrees determine when sex will be a determining factor for the exercise of functions in a particular corps. The accompanying decrees maintained the principle of separate recruitment for a considerable number of corps ranging from police officers to physical education teachers. The Commission commenced infringement proceedings against France for the maintenance of separate recruitment for a number of corps. Following negotiations, in which the Commission accepted that certain of the corps did fall within the exceptions to the directive and France withdrew some of the exceptions,<sup>40</sup> the infringement proceedings centred around prison governors, external corps in the prison service and 5 police corps. France accepted before the Court that the exclusion of external corps in the prison service from the principle of equal treatment was not in conformity with the Directive and announced its intention to remove that corps from that list. The ECJ accepted that prison governors could fall within the exceptions to the Directive but held that the system of recruitment for the five police corps was not in conformity with the Equal Treatment Directive.<sup>41</sup>

### 3. European Community

The roll-call of EC legislative instruments in the field of sex equality is well known: Article 119 of the Treaty of Rome, the shaft of Directives in the 1970's dealing with equal pay (EPD)<sup>42</sup>, equal

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<sup>40</sup> The Commission accepted that the directive permits separate recruitment for assistants at the Maisons d'Éducation of the Légion d'Honneur and for custodial staff in the prison service. France removed various customs posts from the list in Decree No.85-841 of 6 August 1985 and teachers in Decree No.87-55 of 2 February 1987.

<sup>41</sup> Case 318/86 *Commission v. France (Re Sex Discrimination in the Civil Service)* [1988] ECR 3559. There has been very little follow up on this decision doctrinally. It would appear that no action has been taken by the French legislature to comply with this judgment: S. Prechal and L. Senden, *Surveiller la mise en oeuvre et l'application du droit communautaire en matière d'égalité 1994-1995, Rapport Général de 1995 du Réseau d'experts concernant l'application des directives 'égalité'*, European Commission, May 1996, V/1015/96-FR at 15. The ECJ judgment has by no means resolved the problem of differential treatment of men and women in the French public service. See further Chapter 3 at Section 4.4 for a discussion of subsequent case law. For further discussion of the ECJ judgment in this case, see Chapter 4 at Section 5.1.3.4.

<sup>42</sup> Directive 75/117/EEC (OJ 1975 L45/19).



treatment in employment (ETD)<sup>43</sup> and equal treatment in social security<sup>44</sup>, and in the 1980's with occupational social security<sup>45</sup> and self-employed persons.<sup>46</sup> The above directives in this roll-call will be called 'the equality directives'. To this familiar list, the 1990's has added the Pregnant Workers Directive (PD)<sup>47</sup>, the Parental Leave Agreement and Directive<sup>48</sup> and two amendments to Article 119 inserted in the Maastricht Treaty. The first, Art.6(3), adds a new paragraph to Article 119, whilst the second, the so-called '*Barber* Protocol' specified the meaning the Member States wished to give to the temporal limitation of the 1990 judgment by the ECJ in *Barber*.<sup>49</sup>

Beyond these sources of hard law are a series of soft law instruments - Recommendations, Resolutions, Memoranda and Codes of Practice - adopted by the Community in areas such as positive action and equal opportunities, sexual harassment, equal pay and childcare. The shape Community policy in the field of sex equality plans to take can be traced through Action Programmes adopted at EC level. These programmes have a five year duration and the Community is currently engaged on its 4th Action Programme (1996-2000).<sup>50</sup>

Rather than going through the detailed content of this rich vein of EC sources, which is well covered elsewhere,<sup>51</sup> discussion here is confined to a few points on the relative positioning and

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<sup>43</sup> Directive 76/207/EEC (OJ 1976 L39/40).

<sup>44</sup> Directive 79/7/EEC (OJ 1979 L6/24).

<sup>45</sup> Directive 86/378/EEC (OJ 1986 L225/40, 1986 L283/27).

<sup>46</sup> Directive 86/613/EEC (OJ 1986 L395/56). This will not be discussed in this Chapter. For further information on this Directive see, N. Burrows and J. Mair, *European Social Law* (Wiley: Chichester, 1996) 65-68.

<sup>47</sup> Directive 92/85/EEC (OJ 1992 L348/1).

<sup>48</sup> Directive 96/34 EC (OJ 1996 L145).

<sup>49</sup> The amendment to Article 119 does not, of course, apply to the UK, as it is contained in Art.6(3) of the Agreement on Social Policy between the States of the EC with the exception of the UK attached to the Protocol on Social Policy in the Maastricht Treaty.

<sup>50</sup> COM (95) 381 final; for comment on the content of this Action Programme see Szyszczak, 25 *ILJ* (1996) 255.

<sup>51</sup> See, most recently, C. Barnard, *EC Employment Law* (Wiley: Chichester, 1995); Burrows and Mair *supra* at n.45. For a more socio-legal approach to European sex equality sources, see B. Bercusson, *European Labour Law* (Butterworths: London, 1996). Older monographs exclusively devoted to Community sex equality law are E. Ellis, *European Community Sex Equality Law* (Clarendon Press: Oxford, 1991) and S. Prechal and N. Burrows, *Gender Discrimination Law of the European Community* (Dartmouth: Aldershot, 1990).

design and content of these sources.

### 3.1 Relative positioning

In terms of relative positioning, three points should be made about Article 119, all of which flow from its status as the only treaty article in the legislative line-up. The first concerns its relationship with the EPD. This is now seen by the ECJ as explicating the terms of Art. 119 and has, therefore, for all practical purposes, been subsumed within Art. 119. This is important because of the second consequence of Art. 119's Treaty article status. Unlike directives, the other legally enforceable source of Community sex equality policy, Treaty articles are both vertically and horizontally directly effective.<sup>52</sup> While this is of little consequence in the enforcement of the social security directive, this distinction between the direct effect of directives and Treaty articles was forged - and has important practical effects - in the enforcement of the ETD.<sup>53</sup> Thirdly, given its superior status as a legal source, a Treaty article may override restrictions placed upon its scope by secondary legislation. This means that the provisions of equality directives are subject to an internal congruence test with the meaning of Article 119. This produces a certain fluidity in the relationship between these sources.

This fluidity is reinforced by three further factors. First, equal pay and equal treatment sources are not, unlike in the UK, mutually exclusive.<sup>54</sup> Secondly, the supranational nature of these sources means that what will fall within the scope of which source is less clearly determined than at national level. In other words, Community sources are *outwardly directed* but *inwardly defined*. Thus, the provisions dealing with pay, treatment in employment and self-employment, social security and occupational social security in the EC legislative canon - unlike national legislation - not directed towards an EC social security system and a set of EC rules governing pay and conditions of employment and retirement, but towards rules in each of the Member States. Yet, the concepts in these sources are inwardly and authoritatively defined at Community level,

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<sup>52</sup> Case 43/75 *Defrenne v. SABENA* [1976] ECR 455 which held Art. 119 to be horizontally and vertically directly effective.

<sup>53</sup> Case 152/84 *Marshall v. Southampton and South West Hampshire Area Health Authority* [1986] ECR 723.

<sup>54</sup> See *supra* Section 1.1.

through interpretation by the ECJ of the compatibility of national rules with Community sources. This leaves open the possibility for much greater fluidity between Community sex equality sources than at national level where more rigidly demarcated boundaries tend to be laid out in determining the nuts and bolts of scope, application and enforcement. Finally, and intimately connected to this status as an outwardly directed supranational source, some Community rules, particularly those relating to enforcement, are drafted very differently to national sources. The provisions, found in each of the Directives, ensuring judicial enforcement exemplify both the reality and the necessity of a Community drafting style.<sup>55</sup> The greater fluidity of these sources explains why this section very briefly examines not only the directives on equal pay and treatment in employment but also the social security and occupational social security directives.

### **3.2 Design and content**

#### **3.2.1 Definitions of equality and discrimination**

All Community sources use the technique of setting out a *principle of equality* (either equal pay or equal treatment) and then providing a definition of that principle. There are three types of definitions of these principles in Community sex equality sources.

The first, which may be termed a *situational* definition, is found only in Article 119. This means that, in order to define what the equality principle means, the provision sets out a definition of pay and two concrete factual situations or types of action (piece work and work at time rates) which will fulfil the requirements of the definition of equal pay without discrimination based on sex.

The other two types of definition are what may be termed *conceptual* definitions. They explain the meaning of the equality principle in terms of other concepts, chiefly the concept of discrimination. The first type of conceptual definition is found in the EPD which states that the principle of equal pay means 'the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.'<sup>56</sup> The second type of conceptual definition is found,

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<sup>55</sup> EPD Art.2, ETD Art.6, 79/7 Art.6, 86/378 Art.10, 86/613 Art.9.

<sup>56</sup> Art. 1 EPD.

with some slight textual variations, in all the other equality directives. The principle in these equality directives is the principle of equal treatment (not pay). This principle means 'that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'.<sup>57</sup> The difference between these two conceptual definitions reflects a situation common to both French and British legislation in this area: the equal pay provisions in all three sets of legislation make no allusion to direct and indirect discrimination.

The definition of the Community principle of equal treatment differs, but for different reasons, from both French and British equal treatment definitions. The French definition, in Art.123-1, which we considered earlier,<sup>58</sup> is closer to a situational definition than a conceptual definition. It does not use the term discrimination at all. The UK definition in the SDA 1975 s.1, on the other hand, while it does not use the terms direct and indirect discrimination, does, unlike the Community definition, give a legislatively defined content to these two concepts.

### 3.2.2 Scope

The issue of scope considers to what (material scope) and who (personal scope) the principles of equal pay and equal treatment in the Community sources will apply.

#### 3.2.2.1 Material scope

The equal pay principle applies to laws, regulations, administrative provisions, collective agreements, wage scales, wage agreements and individual contracts of employment.<sup>59</sup> The ETD applies the principle of equal treatment to conditions of access to employment, access to vocational training and to working conditions, including the conditions governing dismissal<sup>60</sup>. 79/7 applies the principle of equal treatment to a number of risks protected in statutory schemes. These

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<sup>57</sup> Art.2 ETD, Art.4 79/7, Art.5 86/378 ('whatsoever' omitted; principle of equal treatment 'implies') and Art.3 86/613 ('whatsoever omitted; principle of equal treatment 'implies the absence of all discrimination').

<sup>58</sup> *Supra* at Section 2.1.1.

<sup>59</sup> Arts 3 and 5 EPD.

<sup>60</sup> Arts 3,4 and 5 ETD.

risks are sickness, invalidity, old age, accidents at work and occupational diseases and unemployment.<sup>61</sup> 86/378 applies the principle of equal treatment to schemes which are not governed by 79/7 and covers the same risks with the addition of the risk of early retirement.<sup>62</sup>

### *3.2.2.2 Personal scope*

The equal pay provisions and the ETD apply to employees (or those applying for employment). 79/7 and 86/378 apply the principle of equal treatment to members of the 'working population'. This includes self-employed persons. Both apply to members of the working population whose labour market activity has been interrupted by illness, accident and involuntary unemployment. Women whose labour market activity has been interrupted by maternity are covered only by 86/378. Both apply to persons seeking employment. 79/7 applies to retired and invalided members of the working population. 86/378 applies to retired and disabled workers.<sup>63</sup>

### *3.2.2.3 Exceptions*

Until the Maastricht Treaty, there were no exceptions to the principle of equal pay in Community equality sources. Art.6(3) of the Agreement on Social Policy appended to that Treaty, which does not apply to the UK, added a new paragraph to Article 119 which reads:

This Article shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers.

Art.1(2) ETD excludes social security from its scope. Other exceptions to the application of the

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<sup>61</sup> Art.3(1)(a) 79/7. Art.3(1)(b) goes on to state that the Directive also applies to social assistance, insofar as it is intended to supplement or replace the schemes referred to in (a).

<sup>62</sup> Art.4(a) 86/378. The material scope of this Directive also covers occupational schemes which provide for other social security benefits (in cash or kind) and in particular survivors' benefits and family allowances, if such benefits are accorded to employed persons and thus constitute a consideration paid by the employer to the worker by reason of the latter's employment. Arts.5,6 and 7 further individuate aspects of schemes to which the principle of equal treatment applies.

<sup>63</sup> Art.2 79/7, Art.3 86/378.

ETD are all found in Art.2; the first paragraph of which defines the principle of equal treatment. Art.2(2) excludes occupational activities for which the sex of the worker constitutes a determining factor, although it does not specify what those activities will be. Art.2(3) provides that the Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. Art.2(4) states that the Directive shall be without prejudice to measures to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas covered by the Directive.

The social security directive excludes application of the Directive to survivors' benefits and family benefits.<sup>64</sup> It also states that the Directive shall be without prejudice to the protection of women on the grounds of maternity.<sup>65</sup> Art.7 is entirely devoted to exceptions and permits Member States to exclude from its scope five different types of provisions.<sup>66</sup>

Finally, the occupational social security directive excludes its application to certain types of schemes or particular provisions in schemes.<sup>67</sup> It contains the usual exclusion for provisions relating to maternity protection.<sup>68</sup> The main body of exclusions, defined as deferments, are found in Art.9. The first of these allows Member States to defer the application of the Directive in the determination of pensionable age for the purpose of granting old-age or retirement pensions, and the possible implications for other benefits either until the date on which such equality is achieved

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<sup>64</sup> Art.2(2) 79/7.

<sup>65</sup> Art.4(2) 79/7.

<sup>66</sup> These are (i) the determination of pensionable age for the purposes of granting old age and retirement pensions, and the possible consequences thereof for other benefits (ii) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children (iii) the granting of increases of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife (iv) the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife and (v) the consequences of the exercise, before the adoption of the Directive, of a right of option not to acquire such rights or incur obligations under a statutory scheme.

<sup>67</sup> Art.2(2) states that the provisions of 86/378 do not apply to (a) individual contracts of employment (b) schemes having only one member (c) in the case of salaried workers, to insurance contracts to which the employer is not a party and (d) optional provisions of schemes offered to participants individually to guarantee them: either additional benefits or a choice of date on which the normal benefits will start, or a choice between several benefits.

<sup>68</sup> Art.5(2) 86/378.

in statutory schemes or until such equality is required by a directive. The second permits the exclusion of the equal treatment principle in survivors' pensions until a directive requires equal treatment in statutory social schemes on this matter. Finally, while the setting of different levels of workers' contributions is normally forbidden by the Directive, Art.9 allows different levels in order to take account of different actuarial calculation factors, at the latest until the expiry of a thirteen-year period from the notification of the Directive.

#### **4. Conclusion**

This short chapter has had a very simple aim. It has sought to provide a concise outline of the structure and organisation of sex equality legislation in the three jurisdictions being examined in this thesis. It did so for two reasons. First, it provides an essential starting point for understanding principal features of the legislative maps. Second, as stated in the introduction, examination of the legislation provides us with an overview of the quantity and types of equality seeds the three legislatures wished to plant. With this in mind, we can move on to investigate and try to explain the subsequent development of each of these maps and the interconnections between them.

## **Chapter 2**

# **Effective Utilisation of Equality Rights: equal pay for work of equal value in France and the UK**

### **1. Introduction**

In 1975, equal pay for work of equal value was introduced as a legally enforceable right at supranational level with the passage of the Equal Pay Directive (EPD). In 1983, under pressure from the European Community, the UK introduced and France refined the concept of equal pay for work of equal value in their national legal orders. This chapter investigates and contrasts the non-utilisation of this concept in France with the rich vein of equal value developments in the UK during the same period. It begins to locate the constellation of institutional factors which have led to the creation of a vicious equal value circle in France and a virtuous equal value circle in the UK. While equal pay for work of equal value has been selected as the legal right to be compared, the same conclusion could equally be reached as regards practically all other sex equality employment rights: in the UK they are used, in France they are not. Furthermore, the value of this comparison is not restricted to perceiving France as an anomalous exception in its underuse of equal work for equal value in the EC. Rather, it is the UK which belongs to a minority group of Member States where the legal right to equal pay for work of equal value has been actively used and developed. This uneven utilisation and development of legal equality principles in the EC raises questions as to the adequacy of the implementation methods employed in those Member States where equal pay for work of equal value is clearly suffering from underuse.

### **2. Why does equal value exist?**

Legislative recognition of labour market discrimination has followed a similar temporal path



whether the legislation be at international, supranational or national level, in that the issue of pay discrimination against women is dealt with separately - and before - legal provisions concerning the disadvantage of women in spheres outside that of pay. Thus, ILO Convention No.100, requiring all states to ensure 'equal pay for work of equal value',<sup>1</sup> precedes Convention No.111, requiring its signatories to 'formulate and apply a national policy aimed at the promotion of equal opportunity and of treatment in the area of employment and occupation'. A similar pattern can be found at EC level, with Article 119 and the EPD coming before the passage of the ETD in 1976 and legislation in the two Member States of the EC under discussion. In France, an individual right to equal pay was introduced in 1972 and the equal treatment provision in 1975, while in the UK, the EqPA of 1970 preceded by five years the equal treatment provisions contained in the SDA 1975. However, barring the ILO convention, equal value was present only in an extremely attenuated form in the French and British systems until 1983.

To clarify the position of equal value in the legal anti-discrimination weaponry, it is useful to consider this chronological pattern of legal strategies as underpinning two different strategies of tackling the insufficiencies of equal pay for like work provisions. The failure of equal pay for like work provisions to have a profound effect on gender inequality focused interest on the reason for this failure - the fact that men and women by and large do not carry out the same jobs. This phenomenon is termed occupational segregation and is generally subdivided into two methods of revealing how women do different jobs from men. Thus, vertical segregation describes the smaller percentage of women who attain highly-qualified, highly-paid positions. Horizontal segregation, on the other hand, describes the phenomenon whereby women are clustered into different (and fewer) occupational sectors than men with the result that women do different jobs from men. The wages of feminised sectors are generally significantly lower. The limited initial impact of equal pay provisions underlined the need for legal strategies to address the fact that the labour market is characterised by pervasive and persistent occupational segregation. These legal strategies can be divided into two broad 'types' of action designed to ameliorate the position of women on the labour market.<sup>2</sup>

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<sup>1</sup> ILO Convention No.100 of 1951 was ratified by France in 1953 and by the United Kingdom in 1981.

<sup>2</sup> There is evidently a great deal of overlap between these two types of legal strategy. However, the two-fold classification does have heuristic value. It should be noted however that these two categories - while constituting the main strategies enshrined in legislation - do not exhaust the arguments about the 'equality utility' of other strategies. See

The first is a legal strategy which stresses the removal of direct discrimination when recruiting, promoting, giving access to training and the promotion of positive action measures. This strategy is closely connected with the movement of women up the career ladder and into new areas of work, that is, it aims to improve women's position and pay by moving women into *different jobs*, in the movement of women out of low-paying occupations or grades. This legal strategy can be seen as conceptualising the problem facing women as the *process* of occupational segregation, that is, the placing of women into jobs which are both different from those performed by men and which are lower down the job hierarchy. It thus attempts directly to tackle those mechanisms and to give women access to 'men's jobs'.<sup>3</sup>

By way of contrast, a legal strategy which is based on the concepts of indirect discrimination and equal pay for work of equal value focuses on ameliorating the *results* of occupational segregation. It does not attempt to move women into new jobs. Instead - cognisant of the evidence demonstrating that feminised occupations are often undervalued and underpaid and that the terms and conditions attaching to particularly female employment forms (most notably in the UK part-time work) are inferior to those enjoyed by what is viewed in employment protection legislation and by the majority of employers as the 'normal' employee - it aims rather to improve the pay and conditions of the jobs women currently perform.

It is clear that both types of strategy are needed to counteract labour market discrimination. However, the EC Network of Experts on the Situation of Women on the Labour Market has recently noted with concern that this strategic 'mix' is absent in many Member States. Instead, the desegregationalist strategy has been legislatively consecrated and promoted as the most efficacious strategy. Consequently, the second strategy has been underdeveloped. This exclusive emphasis is critiqued on two main grounds by the Network. The first is that occupational segregation may, in certain circumstances be a positive asset to women:

The objective of equal opportunities policy cannot and should not be solely that of occupational desegregation. Women in fact may have little interest in breaking down barriers to poor quality male occupations. Horizontal segregation may

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further, in particular, Chapters 4, 5 and 6.

<sup>3</sup> See further, Chapter 4 at Section 2.

also have advantages for women seeking higher level posts.<sup>4</sup>

The second is that desegregation strategies are unlikely to have any significant effects on the gender pay gap in the near future:

Progress towards gender equality depends on improving the value and status attached to women's work. Occupational segregation remains a pervasive and persistent characteristic of European labour markets and moves towards desegregation are unlikely to have major effects on the gender pay gap in the short to medium term.<sup>5</sup>

However, both desegregation and re-evaluation strategies are themselves limited to the extent that they are not boldly enough defined to combat the phenomenon which gave birth to them and which simultaneously constrains their effectiveness - the occupationally segregated labour market.

Unequal pay is predominantly the product of institutional structural discrimination in which feminised occupations and sectors are paid less than male-dominated sectors. The mode and facility of equal value implementation will evidently depend on a multiplicity of factors such as firm size, the degree of centralisation (or decentralisation) of pay bargaining, moves towards pay individualisation and performance pay, patterns of unionisation, the existence of a minimum wage and whether the labour market is characterised more by intra-firm or inter-firm occupational segregation. It primarily concerns the underpayment not of a single woman but a group of women who carry out a job not generally performed by men. An effective legal mechanism must take these specificities into account.

In particular, four factors can be singled out at this stage. First, the group nature of pay discrimination makes it unsusceptible to being enforced in the same way as many other employment rights, that is, as individual employment rights. Secondly, the segregated nature of the labour market render crucial the degree of spatial comparisons permitted. The more limited the degree of spatial comparison allowed and the greater the degree of inter-firm segregation in

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<sup>4</sup> J. Rubery and C. Fagan, *Occupational Segregation of Women and men in the European Community, Network of Experts on the European Labour Market, Synthesis Report*, Social Europe Supplement 3/93, xix.

<sup>5</sup> J. Rubery, *Wage Determination and Sex Segregation in the European Community*, paper presented at conference in Brussels 25-26 October 1993, 'Equal Pay, 36 Years Later: In Search of Excellence?!

a particular labour market, the fewer the situations of unequal value the equal value mechanism can touch. Directly connected to this issue is the question of the availability of pay information in a form that can be utilised to determine whether there has been a potential breach of the right to equal pay for work of equal value. Finally, equal pay for work of equal value is concerned with the eradication of pay discrimination, not the establishment of fair pay: however the rigour of the scrutiny applied to reasons given by employers to legitimate pay differences between two jobs found to be of equal value can dramatically affect the effectiveness of the equal value mechanism. The remainder of this chapter will focus predominantly on the first issue, that is, to what extent the institutional mechanisms for the enforcement of the right to equal pay for work of equal value reflect the structural nature of pay discrimination.

Regarding a concept such as equal value which aims to tackle structural pay discrimination, one can assume, unlike the situation for some other employment and equality rights, a general expectation of non-compliance rather than compliance. Therefore, the application of the principle must take this factor into account. This is closely connected to the fact that often the employer and the employee may be unaware that their pay structures are discriminatory. Application of the principle therefore requires employers, unions and employees to possess the tools to rethink the grounds on which pay is determined - in particular whether female dominated jobs are undervalued in terms of recognition and weighting of skills - and the incentives (whether of a positive or negative nature) to redress discrimination whenever and wherever it is determined. It requires informed change of the current operation of pay structures. By definition, an operational equal value principle intrudes into the current operation of pay systems. To what extent do the equal value mechanisms employed at supranational and national level reflect the specificities of equal value?

### **3. Equal value at European level**

#### **3.1 The text**

The Equal Pay Directive (EPD)<sup>6</sup> is made up of the following components:

- the inclusion of pay to which equal value has been attributed in the principle of equal pay. This is because Article 119 refers explicitly only to equal pay for like work (Article 1);
- a job evaluation clause: a requirement that job classification systems used to determine pay must be based on the same criteria for both men and women and drawn up so as to exclude any discrimination on grounds of sex (Article 1);
- an enforcement by individual litigation clause: Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process (Article 2);
- a protection against dismissal clause for employees taking action aimed at enforcing the principle of equal pay (Article 5);
- a publicity clause: Member States shall ensure that the provisions of the Directive are brought to the attention of employees by all appropriate means (Article 7);
- clauses requiring the amendment or abolition of provisions in laws, regulations, administrative provisions, collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay (Articles 3,4);
- an effectiveness clause: Member States shall, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is *applied*. They shall see that *effective means* are available to take care that this principle is observed (Article 6).

### 3.2 Assessment of the text

The most striking aspect of the EPD is its clear emphasis on individual litigation before an equal value forum as the central enforcement mechanism. The possibility for individuals to pursue equal value actions by judicial process and to be protected from dismissal as a result of taking this judicial action underpin the enforcement and realisation of equal value in the EC. While the possibility of attacking the discrimination directly at its source (for example, in the collective

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<sup>6</sup> The full reference for the Directive is Council Directive of 10 February 1975 on the approximation of laws relating to the application of the principle of equal pay to men and women, Directive 75/117/EEC, OJ/L45/19 (19.2.75).

agreement, wage scale etc..) is included,<sup>7</sup> it is less explicitly operationalised in the Directive. It is unclear who will be able to attack these sources of discrimination and before what type of forum.

Apart from the clearly pivotal role of individual litigation in the enforcement of equal pay for work of equal value, the EPD is, according to the criteria outlined earlier, more striking for its omissions than its inclusions. Thus, while the EPD tells us that work to which equal value has been attributed is included within the equal pay principle it does not give any guidance as to what mechanism is to be used to decide if two jobs are of equal value. As the job evaluation clause makes clear, these schemes can be discriminatory: what then is the equal value forum deciding if two jobs are of equal value to use as a measurement method?

The EPD provides no guidance as to the permitted spatial comparisons of the equal value mechanism. Are only intra-enterprise comparisons allowed; are intra-establishment, intra-industry or cross-industry comparisons permitted? Moreover, the Directive makes no explicit statements about the availability, production or analysis of pay information. The employee is to find out about her right to equal pay for equal value through the publicity clause; a necessary but scarcely sufficient method of informing employees of a complex equality right. Nor does it clarify in what situations it will be legitimate to pay unequal pay for work of equal value. In other words, it fails to clarify how to determine whether the pay difference is based on discrimination or not.

The open texture of the Directive's provisions leaves open a large amount of interpretative space for the Member States. On the positive side, this failure to pin down more explicitly the implications of an operational equal value principle had the political advantage of allowing the text to come into existence. As Hoskyns remarks,

It was important that, on the whole, the officials and politicians who negotiated the women's Directives in the 1970's, saw the issues involved as marginal and as ones upon which concessions could be made...they clearly had no idea at the

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<sup>7</sup>Fitzpatrick, 'Towards Strategic Litigation? Innovations in Sex equality Litigation Procedures of the Member States of the European Community', 8 *JCLL & IR* (1992) 208 at 214.

time of how far reaching the effects of these Directives would prove to be.<sup>8</sup>

Furthermore, the EPD's interpretative space has been used to great effect by the ECJ. The supranational level has been the motor for innovation and development of the equal value concept, with recalcitrant Member States often being dragged into line by Community action. The ECJ has delivered a series of expansive judgments, elaborating substantive and procedural concepts in the sphere of equal value.<sup>9</sup> Finally, this interpretative space may be seen as necessary in an area such as equal value in order to permit national legal orders to adapt the implementation of the principle to the specificities of labour law enforcement. However, on the negative side, the interpretative space in the Directive left Member States with a potentially wide margin of manoeuvre to operate a minimalist definition of equal value.

#### **4. Problems and prospects: the individual litigation enforcement mechanism**

An individual litigation model is appropriate in the enforcement of certain aspects of sex equality legislation, particularly in cases where there is a clearly identifiable 'victim' for example where a particular woman is subjected to sexual harassment, is refused promotion, is dismissed because she is pregnant or is paid less than a man performing like work. In other words, in some instances it is an appropriate enforcement tool in cases of individual acts of discrimination. However, the demand for equal value is aimed at the structural under-evaluation of women's work. Thus in individual litigation on equal value, the individual becomes a 'hook' upon which challenge to payment systems can be hung<sup>10</sup> and structural pay discrimination is challenged obliquely rather than directly. This makes the individual litigation model ill-adapted for use in equal value cases.

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<sup>8</sup> Hoskyns, 'The European Community's Policy on Women in the Context of 1992', 15 *Women's Studies International Forum* (1992) 22; the comments of the UK's permanent representative to the Council of Ministers in 1981 on the 1975 EPD are also illuminating, 'I don't think we would have agreed to this measure if we had known about the implications that it would have to the government now over the Equal Pay Act', quoted in J. Pillinger, *Feminising the Market: Women's Pay and Employment in the EC* (Macmillan: London, 1992) 89.

<sup>9</sup> See in particular Case 109/88 *Handels-Og Kontorfunktionaerernes Forbund I Danmark v. Dansk Arbejdsgiverforening (acting for Danfoss)* [1989] ECR 3199, Case C-127/92 *Enderby v. Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535, Case C-400/93 *Royal Copenhagen v. Specialarbejderforbundet i Danmark* [1995] ECR I-1275.

<sup>10</sup> This useful metaphor is found in Fitzpatrick *supra* at n.7.

Yet, in some ways, this is the least of its problems. Enforcing equal value according to an individual employment right model accentuates the problems which arise in other individual enforcement cases. The inherent power imbalance between employer and employee is aggravated by the fact that, unlike the most commonly invoked individual employment right - the right not to be unfairly dismissed - equal value cases are likely to take place during the course of employment. An isolated individual will find it very difficult to challenge the valuation of her work unaided, particularly when this will generally involve challenging pay differentials with a male comparator in the same enterprise. There are difficulties for the individual to perceive the discrimination. For example, it is by no means straightforward for a female cleaner working in a hospital to realise that while it is normal for her (and her cleaning colleagues) to be paid less than the male hospital porter she works alongside, it may nevertheless be illegal. If a wider spatial application of equal value is considered, the difficulties of an isolated applicant finding a comparator in another enterprise cannot be underestimated.

Actually going to court presents a further set of difficulties. Equal value cases involve detailed consideration of payment systems. It will often be difficult for the applicant to have access to this information. Even if she succeeds, analysis of this information will be necessary and her analysis of the information and the valuation of her job will be contested by the employer. In short, it will generally be impossible for individuals to take an equal value case without the support and expertise of others who possess the knowledge and resources to assist the applicant. Hence, an individual method of redress for equal value is destined to remain an unoperationalised paper principle if these structures of knowledge and support are not in place. Therefore, only a *modified* individual litigation procedure will be adequate to provide effective access to the judicial remedy laid down in Art.2 of the EPD.

Further problems and prospects become evident when the ECJ's role is examined. The development of equal value as contained in the EPD at European level has not come about through further pieces of legislation but through the development of procedural and substantive concepts by the Court. While some of these have resulted from action taken by the Commission against a Member State (an Article 169 action) usually the Court has refined and expanded the procedural and substantive principles of Community law obligations through the preliminary



reference procedure (an Article 177 action).<sup>11</sup> Given the expansive rulings of the ECJ, the Article 177 procedure has proved vital in the development of discrimination law.<sup>12</sup> Two points can be made regarding this procedure. First, it gives the court system, at national and supranational level, a central role to play in the incremental development of complex equality rights such as equal value. Secondly, it means that national court references are essential for equal value to develop in a European context. This requires litigation at national level plus a sufficient knowledge of national and Community equal value texts and developments by the national equal value forum to apply the relevant Community principles or make a reference where it is unclear how to apply Community law in a given factual situation. In the absence of national litigation and an awareness of the Community texts, the dialogue between national and Community sources is extremely limited or closed.<sup>13</sup>

To draw all of these points together a checklist can be established for the elements which need to be present for operationalisation of individual equal value mechanisms:

- sufficient diffusion and understanding of equal value to enable an individual to realise when there is a potential breach of her right to equal pay for work of equal value;
- access to pay information and ability to analyse this pay information in an 'equal value' way;
- assistance and support: particularly as the action, unlike other employment rights such as unfair dismissal, will often take place during a continuing employment relationship and involves challenging pay differentials with a male worker who is generally employed in the same enterprise;
- access to court;
- financial assistance and legal expertise: legal costs in equality cases are likely to be higher than

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<sup>11</sup> See for arguments that the Court has shown a definite preference for developing the law through Art.177 references rather than through the Art.169 procedure, Mancini, 'Labour Law and Community Law', *XX Irish Jurist* (1985) 1 at 13-16 and B. Fitzpatrick, J. Gregory and E. Szyszczak, *Sex Equality Litigation in the Member States of the European Community: A Comparative Study* (CEC: Brussels, 1994) 16.

<sup>12</sup> Though on a more cautious note, see Chapter 3 at Section 3 and n.154.

<sup>13</sup> This dilemma is graphically expressed by a former judge of the ECJ, 'Everything depends very much on Article 177, and that means that progress, so far as the Court is concerned is bound to be very patchy, because Luxembourg cannot do anything unless a national court refers a question, and a national court cannot refer a question until somebody litigates the issue', Lord Slynn of Hadley, 'Sanctions in Community Law: An Overview' in M. Verwilghen (ed.) *Access to Equality Between Men and Women in the European Community/L'Accès à L'Egalité entre Femmes et Hommes dans la Communauté Européenne* (Presses Universitaires de Louvain U.C.L., 1993) 123 at 124.

those in other employment areas and require greater legal expertise because of the intrinsic complexity of many equal value cases, the need of a knowledge of Community law and the possible need of an Article 177 reference; the Community dimension can make appeals very likely and make taking an equal value case a lengthy haul through the legal system;

- attunement of enforcers to the objectives and operation of equal value. Enforcers need to possess the ability to determine when two jobs are of equal value and to have knowledge of national and Community aspects of equal value law.

This means that an organisation must be actively involved in the pre-court and court stages of an equal value claim and that judicial equal value fora are aware of equal value precepts and of national and supranational equal value developments. It therefore becomes important to ask to what extent the British and French systems have modified the individual litigation model or provided alternative enforcement models in the area of equal value? In particular, who have they given a role to in the implementation of the right to equal pay for work of equal value and how can these individuals or organisations play their role?

## **5. Legislative development of equal pay for work of equal value in France and the UK**

### **5.1 Pre-1983**

In France, the principle of equal pay for work of equal value was introduced in the first provision dealing specifically with equal pay in 1972. Inserted as Article L.140-2 of the Labour Code, it stated that 'all employers are bound to ensure for the same work or for work of equal value, equal pay between men and women.' In terms of promoting the dissemination and enforcement of the principle of equal pay the law required the posting of the text in places of work, established an individual right to enforce, conferred an investigatory power on the Labour inspectorate and imposed penal sanctions on employers found to be in breach of the equal pay provision. Thus, this equal value mechanism provided no criteria for the production of pay information and no criteria to guide the equal value fora in determining whether the jobs were of equal value or the scope of

spatial application.<sup>14</sup> No explicit enforcement role was given to any body other than the Labour Inspectorate. The period 1972-1983 can be characterised by its paucity of litigation, and the reactionary and confused stance of equal value fora in the few cases that came before them.<sup>15</sup>

The situation in the UK under the EqPA 1970 was much simpler if even less encouraging. An equal value claim could only be taken if an employer had voluntarily introduced a job evaluation scheme and the claimant was being paid less than a man whose job had been evaluated under this scheme as of equal value to hers. Davies attributes this exclusion of equal value from the Equal Pay Act to the fact that, 'equal value claims were seen as requiring a national system of job evaluation, with legislation prescribing a model scheme of job evaluation and such a method of fixing wages would be "completely contrary to all established practices of collective bargaining in this country"'.<sup>16</sup>

## 5.2 The EC intervenes

The European Commission, charged with ensuring that EC law is implemented, produced a report in 1979 on the implementation of the EPD. It concluded that only two Member States, Italy and Ireland, had complied with their implementation obligations. It then initiated infringement proceedings (under Article 169 EEC) against all the other Member States for failure to implement the Directive properly. However, the enforcement action against France was withdrawn due to the appearance in January 1981 of the first draft of a law. This 'Projet 1202' was realised in part

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<sup>14</sup> On spatial application see T.I. St Denis 28 January 1982, CA Paris 14 June 1982, *Essilor*. The case concerned two factories set up by a multinational in Ligny and Chalons, the former employing essentially male workers and the latter mainly female workers. Although according to the claimant, this arrangement was deliberately set up in order to employ the women at a lower rate for identical work, the court judged that as, in the present state of the legislation, no text obliged enterprises to maintain the same pay levels, the company had not violated the law.

<sup>15</sup> See for example Cass. Soc. 24 November 1976, *Galeries Lafayette of Montpellier* where the supreme civil court (the Cassation Court) observed that the lower level judges should have actively sought to discover whether particular characteristics or difficulties existed capable of leading to higher pay (for the male employees). See also the *Printemps* decision: Tribunal de Police 7 November 1980, CA Paris 22 June 1981 (lower court decision overturned because *inter alia* it had failed to take into account the good will of the employer, absence of proof of his will to discriminate and his pursuance of a positive action policy). See generally, De Marguerie, 'Les juges français et la discrimination sexuelle', *Droit Social* (1983) 119.

<sup>16</sup> Davies, 'European Equality Legislation, UK Legislative Policy and Industrial Relations' in C. McCrudden (ed.) *Women, Employment and European Equality Law* (Eclipse Publications: London, 1987) 23 at 28.

in the Auroux Laws legislative package which ushered in a significant revision of French labour law,<sup>17</sup> but was in fact chiefly dealt with in the 1983 employment equality law.

The infringement proceedings against the UK were however pursued.<sup>18</sup> The ECJ's judgment is of particular interest in expanding upon and deepening the EC concept of equal value. The UK argued before the Court that the concept of equal value was too abstract and would require compulsory job evaluation. The Court disagreed stating that the assessment of the 'equal value to be attributed to particular work may be effected notwithstanding the employers' wishes, if necessary in the context of adversary proceedings. The Member States must endow an authority with the requisite jurisdiction to decide whether work has the same value as other work after obtaining such information as may be required.' Thus, the Court underlined the need for access to an authority competent to make equal value determinations and introduced (unlike the provisions of the EPD) the need for information to be obtained by the equal value forum. Following the condemnation of the UK in this case, Equal Value Regulations were introduced the following year.<sup>19</sup>

### **5.3 The new shapes of equal value: institutional role distribution and content**

At least nine institutions or groups can be distinguished which are given an institutional role to play in at least one of the systems. These are courts and tribunals, conciliation bodies, official equality agencies, Labour inspectorates, Public Prosecutors, the Secretary of State for Employment, unions and other institutions representing the workforce, specialised pressure groups and experts. These will be considered in turn.

#### **5.3.1 Courts and tribunals**

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<sup>17</sup> One third of the existing Labour Code was revised by the Socialist administration which came to power in 1981.

<sup>18</sup> Case 61/81 *Commission v. United Kingdom* [1982] ECR 2601.

<sup>19</sup> Equal Value (Amendment) Regulations (SI 1984/1794) and the Industrial Tribunal (Rules of Procedure)(Equal Value Amendment) Regulations 1983 (SI 1983/1807).

In both countries, the task of adjudicating individual equal value claims is entrusted to specialised labour tribunals. In France, the *Conseil de Prud'hommes* is composed of two non-professional judges (hereinafter labour judges), chosen through election by employers and employees respectively. There is a strong, though decreasing, emphasis on conciliation of disputes. The *Conseils* adjudicate all labour disputes based on the contract of employment, although certain disputes concerning collective agreements and the internal works rules are dealt with by professional judges in the mainstream civil system. In case of disagreement between the two labour judges a professional judge from the lowest level court in the civil system (the *Tribunal d'Instance*) is called in. Individual applicants may be eligible for legal assistance depending on their income. Unlike the British system, criminal sanctions, enforced through the criminal courts (*Tribunaux de Police*) play an important role in French labour law.<sup>20</sup> Employers who contravene the principle of equal pay can be fined as many times as there are workers illegally remunerated. In case of recidivism within one year of a judgment, higher fines can be imposed and the employer may be imprisoned for two months. The criminal court may also order publication of the judgment. Failure to display the equal pay provisions in a visible place in the enterprise is also susceptible to penal sanctions.<sup>21</sup> Appeals, depending on whether they originate from a *Conseil de Prud'hommes*<sup>22</sup> or a criminal court go to either the Social or Criminal Chamber of the Appeal Courts, made up of professional judges with no particular labour law specialisation, and on a point of law to either the Social or Criminal Chamber of the Cassation Court.<sup>23</sup>

In Britain, enforcement of equal value legislation is through the Industrial Tribunal system. Industrial Tribunals (hereafter ITs) do not have a general jurisdiction on matters relating to the contract of employment but can enforce a delimited number of statutory rights. Industrial Tribunals are composed of a legally qualified chair flanked by two lay members representing

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<sup>20</sup> See generally Lyon-Caen, 'Sur les fonctions du droit pénal dans les relations de travail', *Droit Social* (1984) 438.

<sup>21</sup> Art.R.154-0 c.trav.

<sup>22</sup> A much higher percentage of labour tribunal decisions are appealed in France than in Britain: 31% of all *Conseil de Prud'hommes* cases go to the *Cour d'appel* with a further 9% reaching the *Cour de Cassation*. In Britain, about 4% of IT decisions were appealed to the EAT in 1990-91; from Cousins, 'Employment Courts: A Socio-Legal Comparison', 44 *Northern Ireland Legal Quarterly* (1993) 44.

<sup>23</sup> For public employees, see Chapter 1 at Section 2.1.4.

employers and employees respectively. In sex discrimination cases, by convention, at least one of the lay members is a woman. Appeals go to the Employment Appeal Tribunal (EAT), organised according to the same tripartite formula and from there into the general judicial system to the Court of Appeal and the House of Lords.<sup>24</sup> Legal aid is not available for cases taken before the IT, but may be available if applicants fulfill eligibility requirements at EAT level and on further appeal.

The determination of equal value by the tribunal follows a distinctly different procedure in France and Britain. In Britain, until very recently it was obligatory to refer the determination of equal value to an independent expert. Despite the fact that this has now been optional,<sup>25</sup> the central role of the expert to some extent removes from the tribunal some of the burden of fact-finding and finding if the jobs are of equal value, although ultimately the weight to be attached to the independent expert's report rests with the tribunal. In France, the tribunal must play a more active role in the equal value determination. Criteria which are to be considered by the tribunal in determining the issue of equal value are set out in Art.L. 140-2 and include experience acquired, responsibilities and physical or mental burdens. The employer is bound under Art.L. 140-8 of the Labour Code to furnish the judge with any elements which may justify the inequality of remuneration. Considering these along with those adduced by the equal value applicant, and having made any other necessary inquiries (which may include an expert referral) the judge comes to a decision. Any remaining doubt benefits the employee and not the employer.<sup>26</sup>

In both countries, a reference may be made to the ECJ by any of these courts to clarify a point of European law dealing with equal value.

### **5.3.2 Conciliation bodies**

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<sup>24</sup> In Northern Ireland, there is no EAT. Appeals from IT cases go directly to the Northern Ireland Court of Appeal, and from there to the House of Lords.

<sup>25</sup> The Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996 (SI 1996/438) reg. 3 amended the EqPA s.2(2)(A) to give ITs the option of determining whether the jobs are of equal value on their own or referring the matter to an independent expert.

<sup>26</sup> Art.L. 140-8 Labour Code.

In both systems, conciliation plays an important role in the settling of labour disputes. However, it has been pointed out that while conciliation may take into account the specific social reality of labour disputes, when successful it generally entails one of the parties renouncing the application of their legal rights.<sup>27</sup> Conciliation is obligatory in equal pay cases in both France and the UK. It is only if conciliation fails that the case will be heard by the tribunal. In Britain, the conciliatory body is ACAS,<sup>28</sup> which is also responsible for appointing independent experts in equal value cases. In France, the task of conciliation is the principal objective of the labour tribunal judge and the informal resolution of disputes underpins the composition of the *Conseil de Prud'hommes* and the procedure governing its operation.

### 5.3.3 Official equality agencies

While in France, the *Conseil Supérieur d'Égalité Professionnelle* (CSEP) is given the task by virtue of Art.L.330-2 of the Labour Code of 'participating in the definition, in the implementation and in the application of sex equality policy' it is very unlike its two UK counterparts. It possesses no legal powers and thus cannot give legal or financial assistance to potential litigants or carry out investigations into employers' practices. It can produce reports and is consulted on draft legislation in the field of sex equality. It produces a bi-annual report on the equality laws.

In the UK,<sup>29</sup> two independent government funded equality agencies, the Equal Opportunities Commissions, have been endowed with a range of powers in relation to sex discrimination laws. The EOCs are given greater powers to aid and assist litigants than to litigate in their own right.<sup>30</sup> Assistance by the EOC to individual litigants may include giving advice, arranging for the giving of advice or assistance by a solicitor or counsel, procuring or attempting to procure the settlement of any matter by dispute, arranging for representation by any person, including all such assistance

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<sup>27</sup> A. Supiot, *Les juridictions du travail* (Dalloz: Paris, 1987) 524.

<sup>28</sup> Advisory Conciliation and Arbitration Service. The equivalent body in N.Ireland is the Labour Relations Agency. In practice, many more cases are conciliated in the UK (65%) than in France (10%) where the level of successful conciliation has fallen dramatically; see Cousins *supra* at n.22 at 156.

<sup>29</sup> One for N.Ireland and one for Great Britain.

<sup>30</sup> Though see Chapter 3 at Section 2.3.5.4 for the emergence of the EOC as a litigator in its own right.

as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings, or any form of assistance which the EOC considers appropriate.<sup>31</sup> Beyond these powers to aid and assist individual litigants, the EOC may carry out formal investigations, issue Codes of Practice, fund research related to the elimination of discrimination and make recommendations regarding the legislation.<sup>32</sup>

#### 5.3.4 Labour Inspectorate and Public Prosecutor

This applies only to the French situation, though Labour Inspectorates are an established and central part of labour law enforcement machinery in several Member States of the EC.<sup>33</sup> The French Labour Inspectorate is charged with ensuring the application of labour law, including the principle of equal pay for work of equal value. An employee who feels she has suffered pay discrimination can approach a labour inspector, who can intervene with the employer on her behalf. Labour inspectors have wide powers of access to enterprises<sup>34</sup> and powers to demand pay information from employers. Art.R. 140-1 of the Labour Code states that the labour inspector may require the employer to provide information on the different elements determining pay in the enterprise and in particular according to the criteria used to classify and evaluate jobs in the enterprise. Labour inspectors must also receive the annual equality report which employers are legally obliged to draw up under Art.L.432-3-1.<sup>35</sup> However, labour inspectors can play no role in the bringing of civil proceedings before the *Conseil de Prud'hommes* by an employee and if she decides to bring such an action the inspector must remain neutral.

The labour inspectors are however responsible for the enforcement of the penal sanctions in the sphere of equal pay. Where an inspector notes a violation of one of these penal provisions, they

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<sup>31</sup> S.75 SDA 1975

<sup>32</sup> See *supra* Chapter 1 at Section 1.4.2 and Chapter 4 at Section 4.2.1.

<sup>33</sup> In the field of equality law enforcement, Labour inspectorates also play a role in Belgium, Greece, Luxembourg, Portugal and Spain; see further, Pettiti, 'Le Recours aux Organes Administratifs et aux Jurisdictions' in M. Verwilghen (ed.) *supra* at n.13, 90 at 97-100.

<sup>34</sup> See for a list of the wide powers given to the Labour inspectorate Art.L.611 of the Labour Code.

<sup>35</sup> See Chapter 1 at Section 2.1.3.1.



have the authority to establish that a breach of equal pay has occurred by drawing up an official report. This report is passed to the Public Prosecutor who may use it as a basis for criminal proceedings against the employer. Pettiti notes that the power to take criminal proceedings gives the labour inspector a strong negotiating position with the employer *vis-à-vis* cases of pay discrimination.<sup>36</sup>

### 5.3.5 Secretary of State for Employment

This applies only to the British system. The Secretary of State for Employment may refer to a Tribunal any question concerning whether a woman's employer is contravening an equality clause, if it is not reasonable to expect her to take steps to have the question determined.<sup>37</sup> This power has never been used.

### 5.3.6 Unions and other institutions representing the workforce

In the UK, unions have no legally defined institutional role in the assistance or substitution of individuals who wish to enforce their legal right to equal pay for work of equal value before the ITs. Recognised trade unions have a right to obtain information from an employer, the absence of which would impede them in their collective bargaining activities.<sup>38</sup> Unions formerly had a right, under s.3 of the EqPA, to refer explicitly discriminatory agreements or pay structures to the Central Arbitration Committee (CAC), an adjudicatory body established under statute, for amendment. The CAC interpreted this provision as allowing them to test for anything amounting to sex discrimination in pay structures, even where the discrimination was not explicit, an approach disapproved of by the High Court in 1979.<sup>39</sup> The jurisdiction was abolished in the SDA

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<sup>36</sup> Pettiti, 'Equal Pay in France' in F. Eyraud *et al.* *Equal Pay Protection in industrialized market economies: In search of greater effectiveness* (ILO: Geneva, 1993) 79 at 87.

<sup>37</sup> S.2(2) EqPA 1970.

<sup>38</sup> S.181 Trade Union and Labour Relations (Consolidation) Act 1992.

<sup>39</sup> *R v. CAC ex parte Hymac* [1979] IRLR 461 (Div.Court). See further Davies, 'The Central Arbitration Committee and Equal Pay', *Current Legal Problems* (1980) 165.

1986 which provides instead (in s.6)<sup>40</sup> that discriminatory provisions in collective agreements are rendered void, though no mechanism is explicitly provided whereby this nullity may be judicially established. Section 32 of TURERA 1993 amended the law<sup>41</sup> to provide that individuals may challenge collective agreements before an IT, the government rejecting an Opposition amendment which would once again have allowed unions, the EOC and other interested organisations to challenge collective agreements.<sup>42</sup>

In France, by contrast, the unions are given a number of institutional roles specifically related to the application of employment equality laws. Under Art.L.123-6 of the Labour Code, French unions which are represented in the undertaking, 'may file any lawsuits arising out of the articles [on sex discrimination and equal pay] on behalf of any worker employed in the undertaking without having to prove that they are authorised to represent the person concerned, on condition that the latter has been informed and has not objected within 15 days reckoned from the date on which the trade union organisation notified the employee of its intention.' This procedure allows for substitution of the individual in the enforcement procedure. Unions may also attack discrimination at source by seising the *Tribunal de Grande Instance* or, in certain instances, the criminal courts.

The 1983 law in France, part of a swathe of laws designed to implant and promote union activity at enterprise level, viewed as a central part of its equality strategy a move away from a breach-sanction model to a 'delegalisation'<sup>43</sup> model, chiefly aimed at empowerment of the bargaining partners. The provisions aiming to effect this change may be placed in a threefold classification: - information, analysis and correction provisions. Important antecedents to the annual equality report required following the 1983 law are to be found in the Auroux Laws. As we saw in

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<sup>40</sup> S.6 SDA 1986 was introduced following infringement proceedings against the UK on the ground that the ETD was being breached as national law provided no means whereby non-legally enforceable collective agreements (as all collective agreements are in the UK) could be declared void or be amended; Case 61/81 *Commission v. UK* [1982] ECR 2601.

<sup>41</sup> See now ss.6(4A) to ss.6(4D) SDA 1986 as amended by TURERA 1993.

<sup>42</sup> See further Ewing, 'Swimming with the Tide: Employment Protection and the Implementation of European Labour Law', 22 *ILJ* (1993) 165 at 171-173.

<sup>43</sup> Junter-Loiseau, 'La division sexuelle des emplois à l'épreuve de la loi 13 juillet 1983 relative à l'égalité professionnelle', *Droit Social* (1987) 143 at 151.

Chapter 1, employers are obliged to submit a report to the enterprise committee at least once a year which must include the development of average monthly and hourly wages by sex. Moreover, when the employer, in carrying out its duty to bargain with the unions at enterprise level introduced in the Law of 13.11.1982, gives the unions information to enable bargaining to proceed more effectively, the information given must allow the comparative analysis of the situation of men and women in the areas of jobs, qualifications, remuneration, hours worked and the organisation of working time. Furthermore the information must make clear the reasons for these situations.<sup>44</sup> Thus, this provision adds a further dimension, as it requires not merely the production of information but the explication and analysis of the difference in situations between men and women. Sutter comments on this provision, 'Although it is true that the principle of equal pay for work of equal value flowing from the Law of 20th December 1972<sup>45</sup> is not explicitly referred to here, the lien operated between job-qualification-pay suffices in itself to drive the annual negotiation towards the realisation of this equality. From this point of view, both texts share the same objective and mutually support each other.'<sup>46</sup>

At branch level, as we saw in Chapter 1,<sup>47</sup> by virtue once again of the Law of 13.11.1982, the employer is obliged to provide similar information in the context of obligations to negotiate wages annually and to revise the system of classifications in use each five years.<sup>48</sup> Furthermore, the law provides that no branch agreements may be extended unless they contain the means of application of the principle of equal pay for equal work and procedures for regulating potential difficulties arising from this subject.<sup>49</sup> This law also requires the National Commission of Collective Bargaining to follow annually the application in collective agreements of the equal pay principle, to note the inequalities still existing and to analyse their causes.<sup>50</sup>

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<sup>44</sup> See Chapter 1 at Section 2.1.3.1.

<sup>45</sup> The law introducing equal pay for work of equal value as an individually enforceable right.

<sup>46</sup> Sutter, 'L'égalité professionnelle dans les droits nouveaux', *Droit Social* (1983) 687.

<sup>47</sup> See Chapter 1 at Section 2.1.3.1.

<sup>48</sup> Article L.132-12 c.trav.

<sup>49</sup> Article L.133-5-3-d c.trav.

<sup>50</sup> Art.L.136-2 8o c.trav.

As noted in Chapter 1, the 1983 law introduced a more thorough going requirement for a annual report specifically dedicated to sex equality to be drawn up by employers with more than fifty employees.<sup>51</sup> The report must be given to the enterprise committee, the Labour Inspector and any employee who requests a copy.

### 5.3.7 Specialised pressure groups

These are only given an institutional role in the implementation of equal value in the French system. French associations with at least five years standing and whose statutes contain an express clause aimed at defending women's rights can take actions before the criminal courts.

### 5.3.8 Experts

Experts have played a central role in the industrial tribunal determination of equal value in the British system, in turn reflecting the heavy emphasis on job evaluation in the British equal value mechanism.<sup>52</sup> Until 1996, in each case where the equal value application was not rejected on preliminary grounds, an independent expert's report had to be ordered by the tribunal. The expert makes a determination as to whether or not the jobs being compared are of equal value. The experts are appointed by ACAS on a part-time basis and are selected on grounds of their job evaluation expertise, industrial experience, understanding of the legislation and availability to undertake the work. The costs of employing the independent expert are covered by the Secretary of State for Employment. The results of the report are used by the tribunal in determining whether the jobs are of equal value and often play a decisive role in the making of this decision by the tribunal. Following amendments made in 1996, the tribunal can now choose whether to entrust the equal value determination to the independent expert or to carry it out itself.<sup>53</sup> It remains to be seen to what extent UK tribunals will have the capacity or the desire to carry out the equal value

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<sup>51</sup> Chapter 1, Section 2.1.3.1.

<sup>52</sup> The other uses of job evaluation are not discussed here. For a detailed discussion and critique of this emphasis see McCrudden, 'Between Legality and Reality: The Implementation of Equal Pay for Work of Equal Value in Great Britain', 3 *International Review of Comparative Public Policy* (1991) 179.

<sup>53</sup> See *supra* n.25.

determination unaided. In France, the decision whether or not to appoint an expert has always rested in the hands of the tribunal. If an expert report is ordered, the costs are initially borne by the employee but will shift to the employer if she wins.

## **5.4 Analysis**

The legal topography of equal pay for work of equal value reveals that in both countries there is a strong emphasis on individual litigation as the principal enforcement method, this method being almost exclusive in the British system. In both countries, a number of features of the equal value mechanism are dealt with in the same way as the enforcement of other individual employment rights. Thus, they go through the same court system, chiefly through the labour tribunals rather than specialised equality tribunals and conciliation is obligatory.

A number of modifications are made to this individual enforcement process. However, these modifications are patterned quite differently in the two jurisdictions. In the UK, the tribunal procedure is modified by the presence of a female tribunal member in all discrimination cases and the central role played by the independent expert. In the field of assistance, information and support, the existence of the EOC is the chief institutional bolster to the individual litigation enforcement process. Unions are not given an institutional role in the individual enforcement of equal value in the UK.

In France, by contrast, it is the unions who are given the legal standing to substitute for individuals in the legal process and unions (and individuals) who are empowered to effect change through the imposition of obligations on employers to produce 'equal value' information which can be utilised for negotiation or litigation. The Labour inspectorate is also placed in a privileged institutional position to effect change. It has unrivalled access to enterprises and the power to impose criminal sanctions to strengthen its equal value negotiating arm. The further possibility for specialised pressure groups constitutes a further important institutional enforcement method.

However, despite the multiplicity of institutional equal value options in France, not only has individual litigation failed to develop, but EC equal value developments have not been integrated and 'para-legal' applications (employer-led or collectively negotiated re-evaluations of feminised

pay structures) of equal value have not taken place. By contrast, in the UK, despite the reluctant and niggardly implementation of equal value, the individual litigation mechanism has been actively used, developed and 'subverted' to build up an equal value jurisprudence which uses access to the ECJ as part of its strategy and where the threat or selective use of individual litigation has been exploited by a significant number of unions to 'litigotiate' equal value. To investigate these issues further, the levels and content of litigation are examined more closely; litigation is then examined as part of a broader strategy and this chapter concludes by examining more closely why British soil has proved more fertile for the implantation of equal value than the soil of its cross-channel counterpart.

## 6. Litigation post-1983

### 6.1 Levels of equal value litigation

In France, during the period 1983-1997 the Cassation Court decided five cases dealing with equal value; three by the Criminal Chamber and two by the Social Chamber.<sup>54</sup> Publication of and information relating to cases below Cassation level in French labour law is not systematically produced and their dissemination depends on articles or casenotes in labour law journals, or in publications by employer organisations and trade unions, which constitute an important source of information and diffusion about case-law developments. The leading labour law journal in France, *Droit Social*, has contained no analyses of equal value litigation under the 1983 law. *Le Droit Ouvrier*, the legal review published by one of the main unions, the CGT, published three equal pay decisions in the period 1983-1993. In 1987, the labour inspectors in ten regions reported the pursuit of 22 discrimination cases; of these, two concerned pay.<sup>55</sup> The 1992 evaluation of the 1983 law carried out by the CSEP reported that a warning had been sent to the Public Prosecutor (the first step in criminal proceedings) in one case dealing with equal pay and that three warnings had been issued by the labour inspectors against three Parisian enterprises for

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<sup>54</sup> Cass. Soc. 19 February 1992, *Casse d'épargne Ecureuil de Paris v. Mme Domice*, Bulletin Civil; Cass. Soc. 16 March 1989, *Mlle Pullès v. Centre de Radiologie de Romans*, Bulletin Civil; Cass. Crim. 26 March 1996 (LEXIS); Cass. Crim. 6 November 1990 (LEXIS); Cass.crim. 31 May 1988 (LEXIS). For further discussion and analysis of these cases and others dealing with equal pay, see Chapter 3 at Section 4.1.

<sup>55</sup> CSEP, *3ème bilan d'application de la loi sur l'égalité professionnelle du 13 juillet 1983* (1990) at 29.

failing to display the equal pay provisions in their enterprises.<sup>56</sup> In 1990, the labour inspectors noted that they made a total of 1,900 observations in the field of sex equality but no breakdown of these statistics was provided.<sup>57</sup> In the agriculture sector, ten observations (the stage preliminary to an official warning) had been made in the field of equal pay.<sup>58</sup> As the labour inspectors are concerned with the enforcement of the penal provisions, this makes it clear that there is practically zero litigation using penal sanctions. It is more difficult to state with any precision how much litigation may actually be going on before the *Conseil de Prud'hommes*, but it would appear that this is also numerically insignificant. It is also clear that any cases that do occur are 'invisible', and therefore thinking about or grappling with the complexities of equal value is unlikely to take place. There have been no references concerning equal pay by a French court to the ECJ.

No associations have developed in the field of equal pay to take advantage of the special standing given to them in the enforcement of these principles before the French courts. The hope that the informational and analysis provisions outlined above<sup>59</sup> may instead have given employers sufficient incentives or the unions sufficient tools to negotiate equal value without going to court is also misplaced. When the most important of these - the annual report required by the 1983 law, is examined - it is clear that employers do not take the fulfilment of this obligation very seriously nor do unions put pressure on employers to secure its fulfilment. For example in the transport sector in the period 1990-1992, only 25% of employers sent the report in spontaneously. The main activity of the Labour inspectors in the sex equality area seems to be observations against enterprises for failing to hand in the annual report.<sup>60</sup> The 1992 CSEP evaluation of the law comments:

It must be recognised that a certain number of enterprises do not consider this report to be a priority, particularly when

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<sup>56</sup> CSEP, *Rapport dressant l'état de l'égalité professionnelle entre les femmes et les hommes, 4ème bilan* (1992) at 39.

<sup>57</sup> *Ibid.* at 38.

<sup>58</sup> *Ibid.* at 40.

<sup>59</sup> See Chapter 1 at Section 2.1.3.1.

<sup>60</sup> For example, 384 of the 572 observations made in 1992 concerned the failure of the employer to give the annual report to the enterprise committee, (CSEP, 1990) *supra* at n.55 at 31.

they are operating with a reduced administrative structure. It must also be recognised that the social partners rarely mobilise around this issue.<sup>61</sup>

In the field of collective agreements, while an interprofessional national agreement on sex equality was signed in 1989, equal pay for work of equal value is not prioritised as one of the main areas of action in the agreement which concentrates on measures to reconcile family and work life, on open access of all jobs to women, and on training for women.<sup>62</sup> As we have seen, the Ministry of Labour should not extend a collective agreement unless it contains the means of application of the equal pay principle. In reality, more than half of extended agreements do not comply with this requirement. Of those agreements which do comply, compliance is overwhelmingly half-hearted and incomplete with the vast majority of agreements merely stating the principle and not its means of application.<sup>63</sup> Jobert notes that the re-evaluation of feminised jobs in negotiations is not high on the agenda when job classifications are being reformed:

Pour le moment, on n'a pas constaté qu'une réévaluation des métiers féminins constituait une préoccupation majeure dans les négociations récentes.<sup>64</sup>

A strikingly different picture emerges in the UK which has got one of the highest levels of anti-discrimination litigation in the EC. In the year 1993-1994, 780 equal pay cases were completed and 418 in 1994-95.<sup>65</sup> However, the vast majority of these were withdrawn and a significant minority were disposed of through ACAS conciliation. Of the 43 cases decided by ITs in 1993-94, nineteen were successful and 24 were dismissed at the tribunal hearing. In 1994-95, eight cases

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<sup>61</sup> CSEP(1992) *supra* at n.56 at 40.

<sup>62</sup> A. Jobert, *Négociation collective et promotion de l'égalité en France*, April 1993, Rapport pour le Bureau International du Travail, 11-12. For the text of the agreement see *Liaisons Sociales* No.10590 of 24.11.1989.

<sup>63</sup> See J. Salvi, *Utilisation dynamique du rapport de situation comparée entre les femmes et les hommes au plan de l'entreprise et à l'échelon de la branche professionnelle*, Rapport du Groupe de Travail, Conseil Supérieur de l'Egalité Professionnelle, January 1989, at 19-20.

<sup>64</sup> Jobert *supra* at n.62 at 36.

<sup>65</sup> 'Tribunal statistics 1993-95', 69 *EOR* (1996) 26.



were successful before ITs and seventeen were dismissed.<sup>66</sup>

Since the equal value regulations have come into force, 7,837 applications have been made against 567 employers. Many of these claims are multiple applications against a single employer.<sup>67</sup> Most applicants in equal value cases are funded either by the EOC or their trade union. In total, 144 cases covering almost 1,100 applicants have been referred to an independent expert since the law came into operation.<sup>68</sup> Types of comparisons which have been successful before the tribunals include typists and secretaries with messengers in a bank, fish packers with labourers and a cook with a painter, a joiner and a thermal insulation engineer.<sup>69</sup>

In a significant number of cases, a settlement has been reached (with backpay) following a finding by the independent expert that the jobs were of equal value.<sup>70</sup>

There are huge procedural problems with the British equal value mechanism, including a plethora of time consuming preliminary procedural hurdles and long time delays in obtaining independent experts' reports. More generally, abolition of the Wages Councils which provided minimum wage standards in certain heavily feminized low paid sectors meant that pay protection was removed from those very female workers who have close to zero opportunities to bring an equal pay claim because of the extreme degree of gender segregation in those sectors and the limitations on spatial comparisons in British equal pay legislation. These are currently the subject of two complaints to

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<sup>66</sup> In 1993-94, 685 cases were withdrawn and 50 were subject to an ACAS-conciliated settlement. In 1994-95, 286 cases were withdrawn and 98 were subject to an ACAS-conciliated settlement; *ibid*.

<sup>67</sup> For example, 1,115 applicants lodged claims against British Coal in 1986 and 1,395 applications were lodged by speech therapists against health authorities. See *British Coal Corporation v. Smith and others* [1996] IRLR 404 (HL) and Case C-127/92 *Enderby v. Frenchay Health Authority* [1993] ECR I-5535. Despite the wide variation in the number of equal value claims lodged each year, the number of employers against whom claims are taken remains fairly constantly between 30 and 35.

<sup>68</sup> See 'Equal value update', 70 *EOB* (1996) 13.

<sup>69</sup> Respectively, *Fox and others v. Lloyds Bank*, *Godthaab and others v. Cawoods Fisheries Ltd*, *Hayward v. Cammell Laird Shipbuilders*, see 58 *EOB* (1994) 18-19.

<sup>70</sup> For example, in *Fleming v. Short Bros.* reported in 51 *EOB* (1993) 19 when the independent expert decided that a clerical grade worker performed work of equal value to a kit marshaller, a guided weapons storeperson and a tools storeperson, the employer settled by giving the three applicants £5,000 and nine other female employees £1,500.

the European Commission by the TUC and the EOC.<sup>71</sup> Furthermore, tribunals and appeal courts have often shown a willingness to interpret employer defences to equal value in a manner which incorporates the discrimination that the mechanism is designed to eliminate.<sup>72</sup> However, the EOC and the unions have devoted a considerable amount of funding and expertise to appealing cases in an attempt to change the interpretation of the case law. This has produced rich results in the form of the ECJ's judgment in *Enderby v. Frenchay Health Authority*.<sup>73</sup> The diffusion of European law equality principles is facilitated by the large number of references from British courts to the ECJ and by the widespread reporting and analysis of the impact of references, including those from other Member States, on British equal value law. One periodical in the UK is devoted exclusively to developments in discrimination law at national and supranational level, and it produces regular and detailed reports on equal value law and practice in the UK and relevant ECJ decisions.<sup>74</sup>

The awareness in the UK of the interpretative promise afforded by European equality law is perhaps exemplified in two cases. As mentioned above, delays owing to insufficient numbers of independent experts employed on a part-time basis are a serious problem in the implementation of equal value. In *Cato v. West Midlands Regional Authority*<sup>75</sup> the IT had appointed an

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<sup>71</sup> The TUC 'Complaint to the Commission of the European Communities for failure to comply with Community law' (89/C26/07) deals chiefly with Wages Council abolition; for detailed analysis of the EOC complaint 'Request to the Commission of the European Communities by the EOC of Great Britain in Relation to the Implementation of the Principle of Equal Pay' (1993), which deals with procedural delays in equal value cases, see 52 *EOR* (1993), 20-24. The reluctance of the Commission to use its discretion to commence Art. 169 proceedings against the UK with regard to these complaints indicates the difficulties both with using Art. 169 as part of a legal enforcement strategy and with assuming the Commission's whole-hearted commitment to ensuring the effective implementation of equal pay in the Member States. For a fuller account of the EOC complaint and its chances of success in EC law see Ellis, 'Equal Pay for Work of Equal Value: The United Kingdom's Legislation Viewed in the Light of Community Law', in T.K. Hervey and D. O'Keeffe (eds) *Sex Equality Law in the European Union* (Wiley: Chichester, 1996) 7.

<sup>72</sup> See Kilpatrick, 'Deciding when Jobs of Equal Value Can be Paid Unequally: an Examination of s.1(3) of the Equal Pay Act 1970', 23 *ILJ* (1994) 311. Following the publication of this piece, it appeared that the most egregious mistakes in the interpretation of s.1(3) EqPA had been laid to rest by the House of Lords in *Ratcliffe v. North Yorkshire County Council* [1995] IRLR 439 and *British Coal Corporation v. Smith* *supra* at n.67. However, a recent spate of decisions has shown that s.1(3) EqPA is still being misinterpreted, to the benefit of employers; see, for example, *Tyldesley v. TML Plastics* [1996] IRLR 395, *Strathclyde Regional Council v. Wallace* [1996] IRLR 670 (CS).

<sup>73</sup> *Supra* at n.67.

<sup>74</sup> *Equal Opportunities Review*.

<sup>75</sup> Case No. 18283/88; discussed in 51 *EOR* (1993) 28-29.

independent expert in October 1988. By October 1991, it was clear that the independent expert felt unable to reach a conclusion as to whether or not the jobs were of equal value. As a result the claim could not be determined under the British equal value provisions as an independent expert's report was, at that time, obligatory. The tribunal decided to hear the case directly under EC law taking the view that the EPD was directly enforceable against public sector employers and proceeded to draw up its own job evaluation criteria on which to decide the case.

Another increasingly important limitation - given the fragmentation of both public and private sector employment in the UK - of the British equal pay mechanism is the limitation in s.1(6) EqPA of spatial comparisons to those who can demonstrate that they are employed by 'associated employers'. The notion of 'associated employment' is given a company law definition in the Act, meaning that many employees who formerly would have had one employer - the State - now fall outside the legislation. The EAT in *Scullard*<sup>76</sup> was confronted with just such a scenario. Ms Scullard was a unit manager in one of twelve units in an independent voluntary association of local education authorities. She was the only woman manager and brought an equal pay claim on the basis that she was paid less than the other unit managers. Her claim was rejected by the IT on the ground that as the association was not a 'company' she could not bring herself within s.1(6) EqPA. The EAT allowed an appeal against this decision on the ground that the class of comparators defined in s.1(6) was more restricted than that in Art.119 as interpreted by the ECJ in *Defrenne No.2* where the Court had stated that the question was whether the applicants and her comparators were employed 'in the same establishment or service'. The EAT concluded, 'To the extent that that is a wider class of comparators than is contained in s.1(6), s.1(6) is displaced and must yield to the paramount force of Article 119, which has direct effect as between individuals.'

## 7. Strategic use of litigation by UK unions

Trade unions have played an essential role in the funding of individual litigation in the area of equal value in the UK. However, looking only at litigation statistics neglects the important dynamic some British unions have developed between litigation and negotiation. Equal value

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<sup>76</sup> *Scullard v. (1)Knowles and (2) Southern Regional Council for Education and Training* [1996] IRLR 344.

litigation has been used as a bargaining tool to get the employers around the table to resolve issues concerning the under-valuation of women in pay structures. Union attitudes to the relationship between law and negotiation are encapsulated in this statement by a TGWU representative:

A legal framework is essential in winning equal pay for women. Litigation is a powerful lever to negotiations and a means of resolving a claim when no mechanism for negotiation exists or negotiation fails.<sup>77</sup>

The equal value campaign by UNISON in the electricity industry illustrates the continuing dynamic in equal value disputes between litigation and negotiation. The union represents 30,000 workers in the recently privatised electricity industry, now made up of 19 companies. The union first attempted to open equal value negotiations with the still nationally controlled industry. When this was unsuccessful, the change to company level bargaining was accompanied by the lodging of equal value claims, backed by the union in 17 of the companies; the remaining two having agreed to negotiate the disputed pay structures. Of the 17 cases brought, twelve were settled, generally following a independent expert's finding of equal value and in 11 of these companies new grading structures are being negotiated. The individual applicants involved in the cases have received backpay totalling over £70,000. According to the union over 10,500 of its members in the electricity industry have won pay rises of up to £2,000 and improved pay scales as a result of the union's equal value activity in this industry.<sup>78</sup>

Union awareness of equal value is widespread. A SERTUC survey of 38 TUC affiliated unions found that 24 included equal value as part of their union members standard training course<sup>79</sup> and many of the unions and the TUC itself have produced guides dealing with DIY equal value and

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<sup>77</sup> For this statement by the Transport and General Workers' Union representative and other unions' views on the litigation/negotiation dynamic see the proceedings of the National Pay Equality Campaign Conference 14/15 September 1991, Working Group on Collective Bargaining Strategies.

<sup>78</sup> 58 *EOR* (1994) at 13-14. A more extensive discussion is to be found in Gilbert, Secker, 'Generating Equality? Equal Pay, Decentralization and the Electricity Supply Industry', 33 *British Journal of Industrial Relations* (1995) 191. See further, National Pay Equality Campaign Conference *ibid.* See also Arthurs, 'Equal Value in British Banking: The Midland Bank Case', Sutton, 'Fighting for Equal Value: Health Workers in Northern Ireland', Hastings, 'Equal Value in the Local Authorities Sector in Great Britain' all in P. Kahn and E. Meehan (eds) *Equal Value/Comparable Worth in the UK and the USA* (Macmillan: London, 1992).

<sup>79</sup> *Struggling for Equality: A Survey of Women and their Trade Unions*, SERTUC Women's Rights Committee, February 1994.

detailing how to use the tribunal system if the employer involved in the equal value claim proves intransigent.<sup>80</sup>

## 8. Deciphering the utilisation puzzle

McCrudden has noted that, in the field of European equality law, the focus has shifted from ensuring that each Member State has incorporated basic Community equality texts and principles into their national systems to examining whether the national systems are interpreting these complex principles properly (in line with European developments) and whether the rights are effectively put into practice.<sup>81</sup> In this chapter, the focus has been on the latter issue: it has looked at the practical application of equal value and in particular *access* to enforcement of this right, although it is evident that the practical utilisation of this legal right in sufficiently high numerical terms is a prerequisite for the *substantive* development of the concept of equal pay for work of equal value and central to the development of 'extra-legal' or 'para-legal' methods of enforcing this principle, for example, through union led claims for pay re-evaluations.

Looking at the bodies entrusted with the institutional support or substitution of the individual in France, principally the unions and the labour inspectorate, it is clear that neither has developed the expertise necessary to discover the content of equal value. The application of equal value requires sustained and focused interest. Unions and labour inspectors need to be alert to possible situations of unequal value. They need to be able to construct a solid argument that one job is of equal value to another. To be able to do this, they need to be given, or have the desire and capacity to acquire, the tools necessary to carry out an equal value analysis. To utilise or generate this information, the institutional enforcers need to see the value of equal value. They need to want to own and exploit its legal potential. Unions in particular need to see equal value as a right worth vindicating and sell its potential not only to female applicants but also to male comparators.

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<sup>80</sup> See in particular *TUC Equal Value Manual* (TUC: London, 1991). The level of TUC and British union expertise on a European level is demonstrated by the fact that in 1993 the Dutch FNV invited them to discuss equal value and job evaluation, and the Italian union CGIL has asked the TUC's permission to use extracts from their Equal Value Manual; see *The Women's Committee Report to the TUC Women's Conference 1994* at 4.

<sup>81</sup> 'The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements', 13 *Oxford Journal of Legal Studies* (1993) 320.

When these conditions are present, as the UK case shows, equal value can become self-sustaining and self-reproducing. Enforcers (unions, the EOC and specialised groups) learn from their own mistakes, devise new tactics and invent techniques to circumvent or neutralise unsympathetic decisions. Judicial fora are likely to learn about equal value only through hearing enough cases to build up a certain familiarity with the contours of equal value. This is particularly important where the judicial forum itself, as in France, carries out the equal value determination singlehandedly. The media publicity derived from successful outcomes informs the general public, and in particular women, of the tenets and practical relevance of equal value and may lead some to rethink the comparative valuation of their own jobs. In the same way, when these conditions are not present, equal value is destined to remain a formal unoperationalised undiscovered principle.

Thus, explaining why equal value has taken such a different path in France and the UK requires explaining why equal value was latched onto by British but not by French unions or by the French Labour Inspectorate. First, it is important to dismiss a number of possible explanations based on litigation cultures or union litigation strategies. French employment litigation levels are generally higher than those in Britain<sup>82</sup> and while both French and British unions have been traditionally reluctant to use law, in both systems some unions have been prepared to develop strategies which include litigation to achieve certain union objectives.<sup>83</sup> Therefore, plausible explanations must be sought elsewhere.

Two principal explanatory factors can be discerned. The first focuses on the importance of the existence of a agency exclusively devoted to equality with sufficient resources and legal powers to provide a constant point of reference, to disseminate information, to collaborate with unions and to provide equal value blueprints. The second concerns the topography of equality in France and the UK, as the former places a much stronger emphasis on process-based desegregationalist strategies to tackle inequality, whilst the latter has placed more emphasis on combatting the results

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<sup>82</sup> Cousins *supra* at n.22 points out that there are 633 employment cases per 100,000 of the labour force in France compared with 114 per 100,000 in the UK, that is, French litigation rates are around five times the current British rate.

<sup>83</sup> For a detailed discussion of the development of trade union litigation strategies in France see Supiot *supra* at n.27, 47-128.

of occupational segregation.

### **8.1 The importance of an equality agency or its functional equivalent**

The issue of the importance of an equality agency can be usefully subdivided into two categories: the first is the functions it carries out and the second is its actual institutional existence. All of its functions - the dissemination of information, the training of enforcers, assistance of individuals wishing to enforce, ability to investigate enterprise pay practices, production of detailed information on equal value developments, the existence of a well-known institutional organ which will provide help and support in equality disputes - could be realised without the existence of an official equality agency. Indeed, a certain number of benefits could accrue from a policy which decides to train normal institutional enforcers in equal value precepts rather than create a specialised agency. Specialised agencies run the risk of being viewed as partisan and their budgetary allocation may not permit them to be proactive rather than reactive. Despite the fact that equal value litigation levels are high in the UK *vis-à-vis* other Member States, they are relatively low *vis-à-vis* general employment litigation levels. Therefore, tribunals only rarely hear equal value cases, and hence may not become familiar with its concepts and with national and European developments in the field of equal value.<sup>84</sup> Where a decision is made to train normal enforcers rather than create a specialised agency, equal value issues can be incorporated into the training courses of unions, the Labour Inspectorate, and courts and tribunals who hear equal value cases. Furthermore, no agency is likely to have, or should have, the resources and scale of presence in the enterprise that unions or a Labour Inspectorate will have. Therefore, for equal value to become operationalised, the participation and activity of the unions and Labour inspectorate is essential. Moreover, for litigation to work effectively, equal value law must be applied by fora with an understanding of its aims, objectives and operation. An equality agency is not essential to train or provide the information which can be used by unions or the Labour Inspectorate in their own training programmes.

A major explanatory factor for the non-operationalisation of equal value in France is that none of the institutional enforcers are trained in the concepts of equal value or its supranational

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<sup>84</sup> See Fitzpatrick, Gregory and Szyszczak *supra* at n.11 at 28.

development through ECJ jurisprudence. Pettiti notes that Labour Inspectors in France are given no specialised training in the matter of equal treatment or equal pay.<sup>85</sup> It is thus unlikely, in the absence of extremely motivated individual labour inspectors, that any action will be taken beyond the noting of simple breaches such as failure to display the equal pay provisions in the enterprise. Unions in France have scarcely mobilised around the issue of equal value in general and none of their publications discuss the possibility of using Article 140-2 of the Labour Code as part of a female job re-evaluation strategy. Within the CFDT - the union which shows most interest in using law imaginatively to achieve union objectives and which has produced the most union literature on equality - while there are signs of support for equal pay disputes<sup>86</sup> and demands for completely feminised job categories (in particular maternal assistants) to be re-evaluated,<sup>87</sup> there are no signs of an active comprehensive 'litigotiation' strategy being developed. The CGT, traditionally more reluctant to engage with law, states, 'Our organisation has made rather little use of the Roudy law [the 1983 law] because of its much too limited nature'.<sup>88</sup> When the training of the *Conseil de Prud'hommes* is examined, the repercussions of this lack of union involvement become even more pronounced. First, the *conseillers* receive very little training. They have the right to six weeks of training during their five year mandate.<sup>89</sup> While this may accord with the informal non-legal approach adopted in France for the resolution of labour disputes, the chances of the *conseillers* possessing adequate legal training to deal with the complicated aspects of equal value, let alone the legal knowledge to keep abreast of supranational developments, are very slim indeed. Furthermore, the training that they do receive has, since 1981, been provided by employer and employee organisations. Unions and employer organisations draw up training agreements with the Ministry of Labour concerning the content and duration of training. Given the lack of union interest in equal value in other spheres and the limited amount of time devoted to training, it is

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<sup>85</sup> Pettiti in F. Eyraud et al, *supra* at n.36, at 86. On the low level of morale in the French Labour Inspectorate see Hidalgo, 'Inspection du travail: crise d'identité et tranches de vie', *Droit Social* (1992) 849.

<sup>86</sup> See for example, CFDT involvement in a strike action because one group of workers (female dominated) were classified differently and paid less for the same work as another group of mostly male workers; Rastoul, 'L'égalité professionnelle a gagné', *Syndicalisme*, 11 July 1991, 13.

<sup>87</sup> See 'L'écart hommes et femmes', *Syndicalisme*, 10 October 1991, 6ff.

<sup>88</sup> Letter 5 October 1994 from M. Dumas, the CGT representative to the CSEP.

<sup>89</sup> See Chanut, 'Pour le meilleur et pour le pire', Dossier, *Liaisons Sociales*, November 1992, No.73, 45; see also Supiot *supra* at n.27 at 449ff.



unlikely that these training programmes deal with equal value in any detail.

Therefore, a first basic step for the effective realisation of equal value in the French system would be the incorporation of equal value training, including its European aspects, into the training programmes of each of these institutional enforcers. This would not require the existence of an official EOC-style equality agency. However, broader European comparisons show that while this is a necessary step, it may be far from sufficient to set in motion the institutional alchemy required for an operationalisation of equal value. For example, in both Belgium and Greece, significant efforts have been made to attune the Labour inspectorates to equality principles and equality laws. In Belgium, the government has endeavoured to educate inspectors in equality law questions and a special system of administrative fines has been introduced which can be imposed on employers where the Public Prosecutor decides not to proceed with a prosecution founded on a breach of equality law provisions. In Greece, specific labour inspectors are given equality law responsibilities. These measures do not seem to have noticeably enhanced the prioritising of equality law enforcement by the Labour Inspectorates.<sup>90</sup> In a similar vein, Herbert notes that giving a right of action solely to unions in the equality sphere seems to leave the utilisation of equality laws a mere theoretical possibility. Hence, in the three Member States where significant levels of union involvement in equal value disputes are to be found - the UK, Ireland and The Netherlands - either a strongly empowered official equality agency exists or significant modifications have been made to the normal enforcement model.<sup>91</sup> Thus, in both Ireland and The Netherlands, many equal value disputes are decided by 'semi-judicial' specialised equality institutions and in The Netherlands, significant powers to take legal equality actions are given to, and are used by, private groups.

This brings us to a consideration of the specific benefits which can be attributed to the actual existence of an equality agency - as distinct from a consideration of each of its separate functions. An equality agency which achieves a significant degree of autonomy from the whims of changing administrations may possess a number of features which can help to foster an environment in which legal and para-legal aspects of complex and opaque equality rights - such as equal value -

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<sup>90</sup> See Fitzpatrick, Gregory and Szyszczak *supra* at n.11 at 80.

<sup>91</sup> Herbert, 'L'accès au juge: qui peut agir et comment?' in M. Verwilghen (ed) *supra* at n.13, 34 at 70.

can gradually develop.

The first and most important of these is an agency's continuity over time. An agency provides a constant reference point for up-to-date information on matters dealing with equality. In so doing, it also recognises the work of other bodies actively engaged in equal value work and will also chart their developing engagement - or lack of engagement - with equality law. Its existence - and its ability to assist individual litigants and therefore demonstrate that practical legal solutions are available to counteract the under-valuation of women's work - contributes to giving equal value a stamp of legitimacy as a 'real' employment right which can lead to concrete gains for groups of underpaid workers rather than it being viewed as a vague unenforceable principle. This practical demonstration of how equality rights can work undoubtedly makes them much more attractive to unions who can then refine and rubberstamp their own equal value approach depending on the sector of activity they are working in. If unions run into difficulties in their development of equal value strategies, the equality agency can always be turned to.

An official equality agency keeps the issue of the enforcement of equality laws alive beyond the few weeks or months following the passage of a new piece of equality legislation when it may receive considerable attention. It helps to encourage long-term, co-ordinated and complex equality strategies - in part because it can initially demonstrate their benefits and in part because it can guarantee publicity and media attention for other enforcers who undertake equal value work.

'Equality expertise' becomes a valued skill which can be used to obtain practical and often substantial gains; a detailed knowledge of equal value litigation provisions and their EC implications is evidently much less useful in France where no-one litigates or talks about equal value as a usable employment right than it is in the UK.

Thus, while an equality agency is certainly not the only method of fostering the growth of an equal value culture, up to now it has proved the most effective. However, specific features of female employment and labour law developments in the UK (and Ireland) during the 1980's may have made the union-agency equal value partnership particularly fruitful. These features include the

need for unions to reinvent themselves faced with a collapsing manufacturing sector; the mushrooming of the very low paid female-dominated service sector; the absence of a minimum wage and the reduction of areas where unions could win significant victories - the Euro-dimension of equal value giving them a strong negotiating arm in this area which they lacked in the last decade in many others.

## **8.2 Differing equality topographies**

At the beginning of this chapter, a distinction was drawn between legal equality strategies which tackle the process of occupational segregation (desegregation strategies) and those which tackle the results of occupational segregation (principally equal value and indirect discrimination) and noted that in many Member States equality strategies have tended to concentrate on the former rather than the latter. France clearly falls into this category. The 1983 law is discussed as the law which introduced the possibility for unions and employers to negotiate employment equality plans, not as the law which modified the procedural and substantive definition of equal pay for work of equal value. Those employment equality plans which exist concentrate almost exclusively on training women to move into different jobs, rather than re-evaluating women's jobs. The move from equal treatment and equal pay to the possibility of positive action measures is seen as the move from formal to substantive equality. Hence, all equal pay strategies, including those involving equal pay for work of equal value are marginalised. As a result, the individual litigation measures laid down in the equality directives as the chief method of enforcing equality rights are, by and large, not used.<sup>92</sup>

This chapter has tried to show the important role litigation can play, both in its own right and, more importantly, as a stimulant for other forms of enforcement. It forms an essential component of any comprehensive equality strategy. If in most Member States of the EC, the right to obtain equal pay for work of equal value has never been used to any numerically significant extent, surely we need to start asking questions about whether this lack of access to equal value for individual women is in conformity with European law.

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<sup>92</sup> For more extensive discussion see Chapter 4 at Section 4.1.

## Chapter 3

### The case law landscape

#### 1. Introduction

In this chapter, I have chosen to concentrate on the concepts of direct and indirect discrimination in areas which are considered to fall broadly within the area of *equal treatment* rather than equal pay. This decision has been taken for two reasons, one practical and the other theoretical.

The first is that reasons of space make it impractical to discuss adequately the cases both on equal treatment and on equal pay in the UK and at EC level. The second is that isolation of the issues that have been seen as prone to challenge on the grounds of equal treatment will clearly highlight the differences between the three jurisdictions' utilisation of equal treatment and the development of the concepts of direct and indirect discrimination within the area of equal treatment. This does not mean that equal pay issues will be completely ignored. Rather, equal pay is used as a counterfoil to trace the development of the depth and reach of the concepts of direct and indirect discrimination in the context of equal treatment.

For two reasons, I have not dealt with France in the same way. First, there is very little French case law and, therefore, giving an overview of the entire case law panorama does not pose the problems of unwieldiness which arise in the cases of the UK and the EC. Secondly, unlike the situation in the UK and the EC, very little information exists on French case law. Consequently, information on the interpretation of equal pay provisions by French courts will also be included in the discussion. The chapter examines UK, EC and finally French case law. It attempts to show what issues have been challenged using sex discrimination laws and critically analyses how the courts have dealt with those issues. The concluding section draws together case law in the three jurisdictions by considering the types of dialogue the national courts have developed with ECJ case law.

## 2. United Kingdom

The sheer volume of UK cases makes the prospect of detailing each one individually both unpalatable and not very useful. Instead, this section aims to provide an understanding of the shifts in trends and conceptions of equality developed in the three decades in which sex equality sources have been enforceable in the UK.<sup>1</sup> The principal focus will be on issues arising from the SDA 1975. It is hoped that, in so doing, the very different emphases in each decade on what emerge as *the* issues to be litigated and resolved using sex equality sources will become apparent.

### 2.1 The 1970s: exploring the utilisation of the national provisions

The tribunals and courts were confronted with issues of both direct and indirect discrimination from the outset.<sup>2</sup> Most of the successful *direct discrimination* cases involved blatant discrimination against individual women. The tribunals accepted as constituting discrimination within the terms of the SDA:

- dismissal of female employees because they were getting married or had just married;<sup>3</sup>
- the decision not to interview a woman because the employer wished to correct an existing sex imbalance;<sup>4</sup>
- making young married women redundant before older married men with family responsibilities;<sup>5</sup>
- refusal to hire a woman to work in a man's clothes shop because she would have to take

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<sup>1</sup> The cases have largely been drawn from the *Industrial Relations Law Reports* (IRLR). Where no court is indicated in brackets following the case, this indicates that the case was decided by the EAT.

<sup>2</sup> The second case heard under the SDA by a IT involved an indirect discrimination claim by a part-time female employee, *Meeks v. National Union of Agricultural and Allied Workers* [1976] IRLR 198.

<sup>3</sup> *McLean v. Paris Travel Service* [1976] IRLR 202 (IT); *Bick v. Royal West of England School for the Deaf* [1976] IRLR 326 (IT:claim rejected because the applicant was single); *North East Midlands Co-operative Society v. Allen* [1977] IRLR 21.

<sup>4</sup> *Roadburg v. Lothian Regional Council* [1976] IRLR 283 (IT).

<sup>5</sup> *Gubala v. Crompton Parkinson Ltd* [1977] IRLR 10 (IT).

inside leg measurements;<sup>6</sup>

- dismissal of a woman because women with young children could not simultaneously run a home and do justice to their job;<sup>7</sup>
- refusal to hire a woman because it was in her best interests not to employ her to work in an all-male environment.<sup>8</sup>

By contrast, applicants who challenged the meaning of the *comparison* to be carried out under the SDA were excluded from its protection. Thus a female to male transsexual who was dismissed was held not to have been treated less favourably on grounds of sex since a male to female transsexual would have been treated in the same way.<sup>9</sup> A woman prohibited from wearing trousers at work was not treated less favourably than a man as no comparable restriction could be applied to men. And even if a comparison were possible, the EAT stated that both female and male staff were treated alike in that both were subject to rules governing appearance, although the rules in the two cases were not the same given the difference of sex.<sup>10</sup> Finally, an IT held that a woman who was dismissed when pregnant could not find the hypothetical man necessary to sustain her claim under the Act as men could not become pregnant and therefore the 'relevant circumstances' failed the 'same or not materially different' test in s.5(3) SDA.<sup>11</sup>

A considerable number of cases were taken by women complaining that they were being treated differently from men because they had reached 60. These cases all turned on the effect of s.6(4) SDA which excluded from the coverage of the Act provisions 'in relation to death or retirement'. Ms Turton was denied an age gratuity of ten weeks' pay for employees over 60 provided by the employer on redundancy. Both the IT and the EAT held that this was not a provision relating to death or retirement under s.6(4) but a condition for qualification for an age gratuity on

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<sup>6</sup> *Wylie v. Dee & Co. (Menswear) Ltd.* [1978] IRLR 103 (IT).

<sup>7</sup> *Thorndyke v. Bell Fruit (North Central) Ltd.* [1979] IRLR 1 (IT). This is the first recorded reference to the ETD in a SDA decision.

<sup>8</sup> *Grieg v. 1. Community Industry and 2. Ahern* [1979] IRLR 158.

<sup>9</sup> *White v. British Sugar Corporation* [1977] IRLR 121 (IT).

<sup>10</sup> *Schmidt v. Austicks Bookshops* [1977] IRLR 360.

<sup>11</sup> *Reaney v. Kanda Jean Products* [1978] IRLR 427 (IT).

redundancy and was therefore unlawful discrimination. Ms Roberts was forced to retire at 60 while men could work until 65. The IT and the EAT agreed that this fell under s.6(4). Ms Garland challenged the granting of post-retirement travel concessions to spouses of male, but not female, employees. The EAT allowed an appeal against the IT's decision that s.6(4) applied on the grounds that it was simply a privilege which had existed during employment and was allowed to continue after retirement. In 1979, the Court of Appeal gave a joint decision on all three cases. It held that all three cases were excluded from the SDA by the operation of s.6(4). It stated that s.6(4) should be interpreted widely as meaning a provision *about* death or retirement, rather than giving it a restricted meaning as applying only to provisions which are consequent upon death or retirement.<sup>12</sup>

The Court of Appeal achieved a certain notoriety in its interpretation of 'detriment' in s.6(2)(b) SDA. In *Automotive Products Ltd v. Peake* it was held that allowing women to leave a factory five minutes before men was not unlawful sex discrimination on *inter alia* the famous ground that, 'it is not discrimination for mankind to treat womenkind with courtesy and chivalry.'<sup>13</sup> The Court of Appeal subsequently recanted on this interpretation of the SDA when a man challenged the fact that men, but not women, were required to work in a Ministry of Defence colour bursting shop. This case also reveals the very limited scope given to ITs to require employers to change practices following a finding of unlawful discrimination. The IT had required the Ministry of Defence to discontinue the practice within three months and recommended that, within that period, protective clothing and separate shower facilities be provided for women. Both the EAT and the Court of Appeal agreed that the IT had no power under s.65 SDA to do either of these things. Its powers were limited to what was laid down in the statute: making a recommendation relating to the applicant, an order requiring the respondent to pay compensation and an order declaratory of the rights of the complainant.<sup>14</sup>

The issue of what documents applicants could obtain from employers in order to assist them in

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<sup>12</sup> 1. *Roberts v. Cleveland Health Authority*; 2. *Garland v. British Rail Engineering*; 3. *Turton v. MacGregor Wallcoverings* [1979] IRLR 244 (CA).

<sup>13</sup> [1977] IRLR 365.

<sup>14</sup> *Jeremiah v. Ministry of Defence* [1979] IRLR 436 (CA); [1978] IRLR 402.

providing evidence of discrimination was also considered by the courts. In *Oxford v. DHSS* it was decided that the applicant was entitled to information concerning the sex and age of the successful competing job applicants but not their names and addresses.<sup>15</sup> In *Nasse* the EAT held that confidential reports on two colleagues could be disclosed to the applicant as well as the minutes of the meetings of a review board where her application had been rejected and that of her two colleagues accepted.<sup>16</sup> The Court of Appeal disagreed, holding that confidential reports should be disclosed in only 'very rare cases'.<sup>17</sup> The House of Lords steered a path between both these decisions. It held that there was no presumption against the disclosure of confidential documents. A tribunal was neither bound to disclose all relevant documents nor to ban *a priori* the disclosure of certain documents. Rather, the IT must satisfy itself that discovery of a document is necessary in order to dispose fairly of the proceedings.<sup>18</sup>

In two cases, the EAT gave valuable guidance to ITs on the application of the statutory definition of *indirect discrimination*. In *Price*, the applicant challenged the employer's requirement that job candidates should be between 17½ and 28 years of age as indirectly discriminatory against women.<sup>19</sup> *Steel* concerned a post office rule allocating 'walks' by seniority which accrued only to permanent postal workers. Mrs Steel, who had been employed by the post office since 1961, was refused a 'walk' on the grounds that a male colleague, employed since 1973 had more seniority than her, as her seniority began to accrue only in 1975 when the rule confining women to temporary status was abolished.<sup>20</sup>

In *Price*, the IT held that the applicant had not shown that the proportion of women 'who can comply' was 'considerably smaller' than the proportion of men. The relevant pool for considering

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<sup>15</sup> [1977] IRLR 225.

<sup>16</sup> *Science Research Council v. Nasse* [1978] IRLR 201.

<sup>17</sup> *Nasse v. Science Research Council*; *Vyas v. Leyland Cars* [1978] IRLR 352 (CA) applied in *University of Reading v. MacCormack*; *Busfield v. University of Essex* [1978] IRLR 490.

<sup>18</sup> *Nasse v. Science Research Council*; *Vyas v. Leyland Cars* [1979] IRLR 465 (HL).

<sup>19</sup> *Price v. Civil Service Commission* [1976] IRLR 405 (IT); [1977] IRLR 291; *Price (No.2)* [1978] IRLR 3 (IT).

<sup>20</sup> *Steel v. UPOW and The Post Office* [1977] IRLR 288; *Steel v. The Post Office* [1978] IRLR 198. A 'walk' is the route which the employee delivering the post must follow.



this was the proportion of women and men within these age groups rather than the proportion available in the labour market. The EAT stated that this was the wrong approach: the IT should take the 'pool' as that of qualified men and women. Secondly, the EAT disagreed with the IT's conclusion that, even if fewer women than men in this age group applied for jobs, this did not prove that they could not comply as no one could really say whether those women with children really wanted a job or chose to stay at home. The EAT held that when examining whether women 'can comply', it is necessary to examine not whether they can theoretically comply but whether they can comply in practice. Knowledge and experience could be taken into account in making this decision. Thus, it was relevant that many women were engaged in child bearing and minding in their mid-20's and early 30's and for some, this postponed their capacity to realise their desire to enter the labour market.

In *Steel*, the EAT laid down guidance on the third prong of the statutory definition: what the employer must do to 'justify' a *prima facie* indirectly discriminatory requirement or condition. The EAT stated that this placed a heavy onus on the employer. Proving that the requirement was convenient was insufficient; it had to be shown that it was necessary. In deciding this, the tribunal had to consider whether the employer could find some other non-discriminatory method of achieving its objective. The tribunal could not merely take into account the needs of the enterprise. Rather, it had to weigh the discriminatory effect of the continuing operation of the requirement against the need for the requirement.

## **2.2 The 1980s: reach expanded, depth diminished and the arrival of Community law**

### **2.2.1 Direct discrimination**

A much more colourful kaleidoscope of issues were considered in the 1980's under the SDA. The courts continued (although, generally, only on appeal) to allow claims where decisions about female employment were based explicitly on discriminatory grounds such as:

- the refusal to employ women with young children because they were too unreliable to be employees;<sup>21</sup>

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<sup>21</sup> *Hurley v. Mustoe* [1981] IRLR 208.

- the decision to dismiss the woman in a married couple rather than her 'breadwinner' husband who worked in a rival firm;<sup>22</sup>
- the refusal to offer secondment to a married woman to do a training course because she would follow her husband's job and not return to her job in Wales.<sup>23</sup>

The courts also interpreted fairly strictly the list of genuine occupational qualifications set out in s.7 SDA where employers pleaded these as permitting discriminatory treatment.<sup>24</sup> Where health and safety was pleaded by the employer, the courts were less willing to apply a strict test to the discriminatory treatment.<sup>25</sup> Who was covered by the SDA was also explored in cases examining the meaning of s.82(1).<sup>26</sup> The courts dismally failed, however, to interpret the s.4 SDA provisions on victimisation in a manner conducive to protecting applicants who commenced proceedings under the Act.<sup>27</sup> The issue of trying to fit pregnancy dismissals inside the SDA continued to trouble the courts. In the middle of the decade the unsatisfactory compromise of the hypothetical 'sick man' as a comparator was reached.<sup>28</sup>

The three areas in which the courts really broke new ground in the area of direct discrimination in this period were: (i) the acceptance of sexual harassment as unlawful discrimination within the terms of the SDA; (ii) deciding when and how tribunals should draw inferences of discrimination in cases before them; and (iii) the interpretation of 'on the ground of sex' in s.1(1)(a) SDA. These will be considered in turn.

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<sup>22</sup> *Coleman v. Skyrail Oceanic Ltd* [1981] IRLR 398 (CA).

<sup>23</sup> *Horsey v. Dyfed County Council* [1982] IRLR 395.

<sup>24</sup> *Tunex Corporation v. Hodgson* [1981] IRLR 530; *Sisley v. Britannia Security Systems* [1983] IRLR 404; *Etam plc v. Rowan* [1989] IRLR 150.

<sup>25</sup> *Page v. Freight Hire (Tank Haulage) Ltd* [1981] IRLR 13. See also Chapter 6 at n.59.

<sup>26</sup> *Oliver v. JP Malnick & Co.* [1983] IRLR 456; *Quinnen v. Hovells* [1984] IRLR 227; *Mirror Group Newspapers v. Gunning* [1986] IRLR 27 (CA).

<sup>27</sup> *BA Engine Overhaul v. Francis* [1981] IRLR 9; *Cornelius v. University of Swansea* [1987] IRLR 141 (CA). The latter case appears to lay down the test that for an applicant to obtain s.4 protection, she has to show that she was treated worse than she would have been if she had commenced other, non SDA-related, legal proceedings.

<sup>28</sup> *Turley v. Allders Department Stores* [1980] IRLR 4; *I. Hayes v. Malleable Working Men's Club and Institute*; *2. Maughan v. North East London Magistrates' Court Committee* [1985] IRLR 367; for amplified discussion see Chapter 5, Sections 3.3.1 and 3.3.2.

### 2.2.1.1 Sexual harassment

Sexual harassment was first recognised as actionable under the SDA in 1984 by the EAT sitting in Scotland in *Porcelli v. Strathclyde County Council*, a decision confirmed by the Court of Session.<sup>29</sup> The ingredients which the courts have utilised for making sexual harassment discrimination within the terms of the SDA are the connection of the definition of direct discrimination in s.1(1) with the act of 'subjecting her to any other detriment' in s.6(2)(b). As in many cases, the harassers are fellow employees rather than the employer, a further statutory ingredient will be necessary in many cases to make the employer liable. This is found in s.41 which treats acts done by a 'person in the course of his employment' as being done by his employer as well as by him, irrespective of the employer's knowledge or approval. S.41(3) provides the employer with a defence where it is proven that 'he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description'.

The *Porcelli* case made it clear that sexual harassment did not need to involve physical contact. It required that the treatment meted out included a significant element of a sexual character to which a man would not be vulnerable. However, it seemed to indicate that sexual harassment would only constitute a detriment in *quid pro quo* cases, that is, where the woman was disciplined, dismissed, forced to transfer as a result of the harassment, etc. However, *De Souza* (a racial harassment case) established that it was sufficient that the reasonable employee could justifiably complain about his or her working conditions.<sup>30</sup>

After this stunning start to granting SDA protection to sexually harassed women at work, the rest of the 1980s saw the courts whittling away the value of this protection. In *Balgobin*<sup>31</sup> the flimsy evidence that an employer had made known its equal opportunities policy provided a s.41(3) defence. The tribunals could not see what other practical steps the employer could have taken to

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<sup>29</sup> [1986] IRLR 134 (CS).

<sup>30</sup> *De Souza v. The Automobile Association* [1986] IRLR 103 (CA).

<sup>31</sup> *Balgobin and Francis v. London Borough of Tower Hamlets* [1987] IRLR 401.

prevent the harassment. In *Snowball*,<sup>32</sup> it was held that the sexual history of a claimant was relevant and could be admitted as evidence in a sexual harassment claim. In *Wileman*, the EAT held that an IT, in making awards for injury to feelings, was entitled to take into account that the applicant had invited sexual remarks by wearing 'scanty and provocative' clothes to work.<sup>33</sup>

### 2.2.1.2 Inferences in direct discrimination

In direct discrimination cases the legal burden of proof rests with the claimant. In recognition of the difficulties this may pose a claimant, the courts, in particular the Northern Ireland Court of Appeal, developed a number of devices to assist claimants.<sup>34</sup> One such device, the notion of a shifting evidential burden of proof, was, however, not a useful one in the eyes of the British EAT. They considered that it obscured rather than clarified the issues. Instead, the EAT proposed that ITs should remember that direct evidence of discrimination is rarely going to be available and that they should therefore draw inferences from the primary facts. If these indicated discrimination of some kind and the employer failed to give a satisfactory explanation, the inference of unlawful discrimination on the facts would succeed.<sup>35</sup> However, it remained unclear whether the IT *should* make such an inference or merely *could* make such an inference.<sup>36</sup>

### 2.2.1.3 The interpretation of 'on the ground of sex'

New developments in the interpretation of this phrase arguably arose because criteria were challenged which were unlike the overtly discriminatory 'no women with children' criteria considered above.<sup>37</sup> These 'new' criteria were often an attempt to achieve some other objective:

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<sup>32</sup> *Snowball v. Gardner Merchant* [1987] IRLR 397.

<sup>33</sup> *Wileman v. Minilec Engineering Ltd* [1988] IRLR 144.

<sup>34</sup> *Wallace v. SE Education and Library Board* [1980] IRLR 193 (NICA); *Conway v. Queens University of Belfast* [1981] IRLR 43 (NICA).

<sup>35</sup> *Khanna v. Ministry of Defence* [1981] IRLR 331; *Chattopadhyay v. Headmaster of Holloway School* [1981] IRLR 487.

<sup>36</sup> For the 'could' formulation see *Noone v. NW Thames Regional Health Authority* [1988] IRLR 195 (CA).

<sup>37</sup> See *supra* n.3-8 and n.21-23 and accompanying text.

fairness or the alleviation of need. The distinguishing feature of these criteria is that, while framed neutrally, that neutrality is defined by reference to sex.

The crucial backdrop to the disputed import of s.1(1)(a) was the EOC challenge to the practice by an education authority of requiring girls to get higher marks than boys in examinations taken at the age of eleven in order to get grammar school places.<sup>38</sup> This was overt discrimination and therefore not one of the 'new' criteria. The House of Lords held unanimously that this constituted direct discrimination. In answer to an argument by the Council, however, that it had no 'intention or motive' to discriminate, Lord Goff stated that intention and motive were not necessary to establish liability. The test under s.1(1) to determine whether there had been less favourable treatment on the ground of sex was whether 'the relevant girl or girls would have received the same treatment as the boys but for their sex'. Prior to this case a 'new' neutrally-framed, gender-defined criterion had come before the High Court of Northern Ireland.<sup>39</sup> The EOC (NI) took judicial review proceedings, on similar grounds to those taken by the British EOC, on discrimination against girls' entrance to grammar schools. The education authority did not argue that it had not discriminated but rather that it had allowed the boys to retain their places on the ground that it would be unfair to withdraw them after notification. The court rejected this argument, stating that as the boys had been awarded the places as a result of the discriminatory marking scheme, their more favourable treatment flowed directly from acts of unlawful discrimination.

This was not the position adopted by the majority of the Court of Appeal in a challenge by Mr James to a council swimming pool tariff which gave free entrance to 'those who have reached the state pension age'.<sup>40</sup> This meant that Mr James' wife did not have to pay while he did, though they were both 61 years old. The court held that this was not unlawful discrimination on the ground of sex. They justified their decision by stating that the statutory test indicated that the reason why the plaintiff treated the defendant less favourably was the central issue to be ascertained rather than the causative link between the defendant's actions and the plaintiff's detriment. Where neither

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<sup>38</sup> *R. v. Birmingham City Council ex parte EOC* [1989] IRLR 173 (HL).

<sup>39</sup> *Re Equal Opportunities Commission for Northern Ireland's Application* [1989] IRLR 64 (NIHC).

<sup>40</sup> *James v. Eastleigh Borough Council* [1989] IRLR 318 (CA).

the overt nor the covert reason for treating the defendant less favourably related directly to the sex of the plaintiff, the ground was not sex but other grounds, in this case to aid the needy. The court stated that their decision was not contrary to the House of Lords decision in *R v. Birmingham City Council*<sup>41</sup> as a clear distinction existed between the ground or reason for which a person acts and his intention for so acting. The House of Lords had decided only that intention to discriminate was not necessary.

The resolution of this debate - on whether the 'but for' test (which places its emphasis on the effects for the victim) or the 'why' test (which concentrates on the perpetrator's reasons for acting) would prevail - did not come about until the next decade.

### 2.2.2 Indirect discrimination

A broader range of practices which affect women's ability to participate in paid employment or training were challenged before the courts in the 1980s than in the decade before. By and large, they concerned three main groups of women. The first group were mothers who worked full-time before the birth of their child and who subsequently had their request to work part-time, to job share or to work a particular pattern of part-time hours on their return to work refused.<sup>42</sup> The second group were part-time women employees who found themselves subject to a 'part-timers first' redundancy criterion.<sup>43</sup> The third group were female single parents who were refused hardship grants because they were never married or who have fewer rights than those with partners to pass on pension rights.<sup>44</sup>

Only two safe conclusions can be drawn from the way indirect discrimination was interpreted in these cases. The first is that neither the statutory definition nor the introduction of the *Bilka*

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<sup>41</sup> See *supra* n.38.

<sup>42</sup> See respectively, *Home Office v. Holmes* [1984] IRLR 299; *Clymo v. Wandsworth London Borough Council* [1989] IRLR 241; *Greater Glasgow Health Board v. Carey* [1987] IRLR 484.

<sup>43</sup> *Clarke v. Powell v. Eley (IMI) Kynoch Ltd* [1982] IRLR 131 (TT); [1982] IRLR 48; *Kidd v. DRG (UK) Ltd* [1985] IRLR 190.

<sup>44</sup> *R v. Secretary of State for Education ex parte Schaffter* [1987] IRLR 53 (HC); *Turner v. The Labour Party and The Labour Party Superannuation Society* [1987] IRLR 101 (CA).

criteria for justifying *prima facie* indirect discrimination in 1986 constrained the tribunals to any significant extent.<sup>45</sup> The second safe conclusion largely explains the first. This is that the tribunals, with only one exception,<sup>46</sup> were determined to treat most of the elements required to establish indirect discrimination as questions of fact for the IT rather than questions of law. This meant that decisions would only be set aside if they were perverse; in other words, decisions that no reasonable tribunal could have come to. The wide variation and lack of consistency this produced can be seen in the interpretation by the courts of each of the limbs of the statutory definition.<sup>47</sup>

### 2.2.2.1 Requirement/condition

In *Clarke*<sup>48</sup> the EAT rejected the argument that 'requirement' and 'condition' have two separate meanings. Rather the words had a large degree of overlap and should not be narrowly construed. A similar line of reasoning was followed by the EAT in *Holmes*<sup>49</sup> where the obligation to work full-time was held to be a requirement or condition. The court stated that these words were of wide import and were fully capable of including any obligation of service. This was not the view of the EAT in *Clymo*<sup>50</sup> which held that full-time work was part of the nature of the job itself rather than a requirement or condition imposed by the employer.

### 2.2.2.2 A considerably smaller proportion of women than men can comply

This is often referred to as defining the 'pool' for comparison. This is the area where the EAT was

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<sup>45</sup> Case 170/84 *Bilka-Kaufhaus GmbH v. Weber von Hartz* [1986] ECR 1607. To be justified the challenged measure or practice must meet a genuine need of the enterprise, must be necessary for that purpose and must be suitable for attaining the objective pursued.

<sup>46</sup> *Clarke supra* at n.43.

<sup>47</sup> A person discriminates against a woman under S.1(1)(b) if he applies to her a requirement or condition which applies or would apply equally a man but (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply; and (ii) which cannot be shown to be justifiable irrespective of the sex of the person to whom it is applied; and (iii) which is to her detriment because she cannot comply with it.

<sup>48</sup> *Supra* at n.43.

<sup>49</sup> *Supra* at n.42.

<sup>50</sup> *Supra* at n.42.

most insistent that this was a question of fact and not of law, and was consequently extremely reluctant to upset IT findings. *Kidd*<sup>51</sup> provides a perfect illustration of this.<sup>52</sup> In this case, the IT defined the pool as 'those households in which there were very young children requiring care to an extent potentially incompatible with full-time employment'. It went on to say that, without evidential support, it would no longer be safe to assume that a considerably greater proportion of married women with young children (or women than men) regularly undertake a caring role. The EAT held that this pool was not one that no reasonable tribunal could have chosen. This is not to argue that in many cases the IT did not approach the 'pool' question properly - often they did.<sup>53</sup> However, the chance of successful appeal against IT decisions which incorporated discrimination into the definition of the 'pool' was minimal. A first instance court that got it right was the High Court in *ex parte Schaffter*.<sup>54</sup> In defining the 'pool' the court refused to accept the Secretary of State's submission that it was irrelevant that in absolute numbers substantially more women than men were adversely affected by the eligibility test<sup>55</sup> and that the appropriate pool for comparison was that of single lone parents. The court stated that in determining the appropriate pool for comparing the positions of men and women who can comply with a requirement, the risk of incorporating an act of discrimination into the definition must be avoided.

### 2.2.2.3 Justifiability

The strict test laid down in *Steel*<sup>56</sup> in the 1970s was rapidly replaced by the Court of Appeal in

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<sup>51</sup> *Supra* at n.43.

<sup>52</sup> See also *Clymo supra* at n.42.

<sup>53</sup> See, for example, *Pearse v. City of Bradford Metropolitan Council* [1988] IRLR 379.

<sup>54</sup> *Supra* at n.44.

<sup>55</sup> The eligibility was for hardship grants made while studying. The test required being a lone parent who had once been married rather than a 'single' lone parent. Both sides accepted (i) there was no significant difference between the percentage of female lone parents who are single and the percentage of male lone parents who are single (ii) that as there is a decisive difference between the percentage of lone parents who are female and the percentage who are male, the requirement means that four times more female lone parents than male lone parents are ineligible for hardship grants. The Secretary of State argued that (i) was the relevant statistic while the single lone parent argued that (ii) was the relevant statistic.

<sup>56</sup> *Supra* at n.20.



two race discrimination cases, *Ojutiku* and *Panesar*.<sup>57</sup> This new test stated that the discriminatory effect of the requirement had to be balanced against the reasons adduced by the employers for introducing it; it had to be shown that the requirement was justifiable in the sense that it was right and proper in the circumstances for the company to adopt it. The test leaves justification largely within the tribunal's discretion. In *Clarke*<sup>58</sup> the EAT applied the *Panesar* test but stated that justification, in its view, should not be left to the discretion of ITs. It stated that, in an area concerning emotive matters such as race and sex discrimination, there were no generally accepted views as to the comparative importance of eliminating discriminatory practices, on the one hand, as against business profitability, on the other. Therefore, it thought that the law should lay down the degree of importance to be attached to eliminating indirect discrimination so that ITs would know how to strike the balance. The EAT further added that it felt that 'last in first out' (LIFO) as a redundancy criterion was justifiable. This call for higher courts to treat justifiability as a question of law was explicitly rejected in later decisions. Thus, *Kidd*<sup>59</sup> held that the IT had not erred in deciding that making part-time employees redundant first was justifiable. The 'marginal advantages' pleaded by the employer represented sound and reasonable reasons for the full-time work requirement which would be acceptable to right thinking people as reasonable and sensible. The EAT added that the case demonstrated 'how unsafe it is to act upon generalised assumptions about whether or not particular requirements are by their nature indirectly discriminatory...[e]very case will depend on its own facts as judged by the industrial tribunals.'<sup>60</sup>

This strong tendency to refuse to lay down criteria had a marked impact on the initial reception of the *Bilka* objective justification test in the UK courts.<sup>61</sup> Only one case - *ex parte Schaffter*<sup>62</sup> - directly applied the *Bilka* test and this case was argued, not on the SDA, but directly on the

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<sup>57</sup> *Ojutiku v. Manpower Services Commission* [1982] IRLR 418 (CA); *Panesar v. Nestlé Co.* [1980] IRLR 64 (CA).

<sup>58</sup> *Supra* at n.43.

<sup>59</sup> *Supra* at n.43.

<sup>60</sup> See also *Holmes supra* at n.42 where the EAT stated, 'whether such a requirement is justified or not is precisely the task Parliament intended to entrust to Industrial Tribunals. ...All such cases will turn on their particular facts'.

<sup>61</sup> *Supra* at n.45.

<sup>62</sup> *Supra* at n.44.

compatibility of British law with the ETD. In the others, the courts either applied *Rainey*,<sup>63</sup> the first authoritative national case purporting to apply the *Bilka* test, continued to state that objective justification was a question of fact for the IT<sup>64</sup> or, in the most reactionary of instances, argued that the *Bilka* test, properly understood, equated with reasonableness, and did not differ fundamentally from the English authorities of *Ojutiku* and *Panesar*.<sup>65</sup>

#### 2.2.2.4 Which is to her detriment because she cannot comply

Once again, the decade started well and subsequently went down hill. In *Clarke*<sup>66</sup> the IT had distinguished between one of the claimants, who had had a young child in the period before she was made redundant because she was a part-timer, and the other claimant, who in the last six years could have complied with the requirement to work full-time, but had not done so. The former claimant, who 'at all material times' could not comply, fell within the statutory definition while the latter fell outside. The EAT allowed an appeal on this ground stating that the statutory definition did not include past opportunities to comply: the only material question was whether at the date of the detriment she could or could not comply. This was not the approach adopted in *Turner*<sup>67</sup> where the Court of Appeal held that it could not be said of a single woman that she 'cannot marry'. Hence it could not be said that Ms Turner could not comply with a condition of leaving a surviving spouse at a future date.

Finally in *Clymo*<sup>68</sup> the EAT held that requiring the applicant to work full-time and refusing her request to job-share following childbirth was not to her detriment as she had been offered childminding by her employers, and she and her husband were comfortably off. Ms Clymo's argument that it was to her 'detriment' because she wanted to be a mother and a branch librarian

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<sup>63</sup> *Rainey v. Greater Glasgow Health Authority* [1987] IRLR 26 (HL); *Carey supra* at n.42.

<sup>64</sup> *Cobb and others v. Secretary of State for Employment and Manpower Services Commission* [1989] IRLR 464.

<sup>65</sup> *Clymo supra* at n.42.

<sup>66</sup> *Supra* at n.43.

<sup>67</sup> *Supra* at n.44..

<sup>68</sup> *Supra* at n.42.

could not be accepted. According to the EAT, in trying to fit society into the framework of the statute and the statute into society, in every employment ladder a stage would come when a woman with family responsibilities would have to make a choice.

### 2.2.3 The arrival of Community law

The 1980s was the decade when the UK courts began to make preliminary references to the ECJ on the interpretation of sex equality sources. So far as the SDA was concerned these references principally concerned the effect of the ETD or Article 119 on s.6(4) of that Act.<sup>69</sup> Mr Burton, Ms Garland, Ms Roberts, Ms Worringham, Mr Barber, Mr Newstead, Ms Marshall and Ms Foster all turned to EC law as a result of the exclusion of their claim in national law by virtue of s.6(4).<sup>70</sup> All but that of Mr Barber and Ms Foster resulted in an ECJ ruling in the 1980s.<sup>71</sup>

Three of the claims were unsuccessful. British Rail offered an early retirement package to employees. Female employees could benefit at the age of 55 and male employees could benefit at the age of 60. Mr Burton, 58 years old, complained that refusal to grant him this package constituted unlawful discrimination. His claim was held to be excluded under national law by s.6(4). The reference asked whether either Art.119 or the ETD were breached in this factual situation. The ECJ's reply made it clear that termination of employment would fall under Art.5 ETD governing dismissal. However, in this particular case, Art.5 was inapplicable as the qualifying ages for access were linked to the state retirement pension age and Directive 79/7 permitted differential state pension ages to continue at present. Ms Roberts also had a claim under

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<sup>69</sup> Though see also the reference in Case 224/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, discussed *infra* at n.197 and in Chapter 4 at n.145.

<sup>70</sup> At national level see *Worringham v. Lloyd's Bank* [1979] ICR 174; *Burton v. British Railways Board* [1981] IRLR 16; *Southampton and South West Hampshire Health Authority (Teaching) v. Marshall* [1983] IRLR 233; 1. *Barber v. Guardian Royal Exchange Assurance Group*; 2. *Roberts v. Tate & Lyle Food & Distribution* [1983] IRLR 240; *Newstead v. Department of Transport and HM Treasury* [1985] IRLR 299.

<sup>71</sup> *Barber* and *Foster* were not decided by the ECJ until the 1990s. The judgments by the ECJ in the 1980s: Case 69/80 *Worringham v. Lloyd's Bank* [1981] ECR 767; Case 12/81 *Garland v. British Rail Engineering* [1982] ECR 359; Case 19/81 *Burton v. British Railways Board* [1982] ECR 554; Case 151/84 *Roberts v. Tate & Lyle Industries* [1986] ECR 703; Case 152/84 *Marshall v. Southampton and South West Hampshire Area Health Authority* [1986] ECR 723; Case 192/85 *Newstead v. Department of Transport and HM Treasury* [1987] ECR 4743. The first preliminary reference to the ECJ from a UK court was the Court of Appeal's reference in Case 129/79 *Macarthys Ltd v. Smith* [1980] ECR 1275 applied in [1980] IRLR 210 (CA).

Art.5 ETD rejected by the ECJ. She had argued that a grant of a pension to both male and female employees at the age of 55 discriminated against women in that they only received a pension within five years of their retirement age whilst men received a pension within ten years of their retirement age. The ECJ ruled that this amounted merely to a collective measure adopted irrespective of sex to guarantee all employees the same rights. Mr Newstead, who complained that he had had to forfeit immediate enjoyment of part of his earnings to contribute to a widow's pension scheme, which female employees did not have to contribute to, was told that his claim did not fall within any of the EC sex equality provisions.

However, Ms Garland, who had had her claim for post-retirement travel concessions blocked by the Court of Appeal's interpretation of s.6(4) in 1979,<sup>72</sup> was successful on the basis of Art. 119. Ms Worringham was also successful on the narrow basis that paying male, but not female, employees 5% extra gross pay up to the age of 25 in order to compensate male employees for the pension contributions they had to make unlike female employees who only became eligible to pay contributions from the age of 25 onwards. It was unnecessary for the Court to answer the broader question as to whether the pension scheme in question fell under Art. 119.

The central decision was undoubtedly that in the case taken by Ms Marshall, who had been forced to retire at 62, against her employer, a local health authority. The IT originally ruled in this case that the ETD overrode s.6(4). The EAT overturned this decision on the ground that there were no higher court decisions on the binding nature of directives. Before the ECJ, the health authority argued that, as in *Burton*, the contractual ages merely reflected the minimum ages fixed by the scheme. The ECJ held that Ms Marshall's case fell squarely within Art.5 ETD as retirement age, in this case, could be distinguished from pensionable age, as in *Burton*. It also held that directives were vertically directly effective, that is, they could be enforced by individuals against the state and 'emanations of the state', but not horizontally directly effective.

Following *Garland* and *Marshall*, four things happened before the UK courts. First, women employed by publicly owned companies attempted to capitalise on the fact that the ETD could be directly relied on against 'emanations of the state' so that s.6(4) SDA would not block their

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<sup>72</sup> *Supra* at n.12.

claim. Both Ms Foster, who had been employed by British Gas and Ms Doughty, who had been employed by Rolls-Royce, were unsuccessful in this argument before the national courts.<sup>73</sup> The House of Lords referred a question on this matter to the ECJ in 1989.<sup>74</sup>

Secondly, women employed by private companies, and who could not therefore rely directly on the ETD, attempted to persuade the courts to construe s.6(4) in a manner which conformed with the EC sex equality provisions. This was successful in *Garland* where the House of Lords construed s.6(4) to make it compatible with Art.119.<sup>75</sup> The Court of Appeal in *Duke* evidently thought the House of Lords would do the same again with regard to retirement ages, s.6(4) and the ETD, as they expressed regret that they were bound by their 1979 decision in *Roberts v. Cleveland AHA* and sent an expedited appeal to the House of Lords which was not so bound.<sup>76</sup> However, the House of Lords firmly declined this invitation and stated that s.6(4) SDA could not be construed to accord with the ETD on the issue of discriminatory retirement ages.<sup>77</sup> Thirdly, women who had been dismissed at 60 attempted to claim outside the three month time limit laid down in s.76(1) SDA on the ground that *Marshall* had altered the state of the law on the discriminatory dismissal of women at 60. Ms Foster presented her claim more than eight months after the date of her dismissal. The EAT held that the IT had been wrong not to use the 'just and equitable' ground in s.76(5) SDA to hear her claim out of time. The IT had been wrong to consider that whether the claim was one day out of time or six years was irrelevant. The task of the tribunals was to decide where the line should be drawn.<sup>78</sup>

Fourthly, having been the chief protagonist in utilising Art.5 of the ETD to deprive s.6(4) of much of its effect in the national courts (and leading to its prompt legislative revision in the SDA 1986), Ms Marshall promptly took up arms again, this time to argue that the statutory limit on the

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<sup>73</sup> *Foster and others v. British Gas plc* [1988] IRLR 354 (CA); *Rolls-Royce plc v. Doughty* [1987] IRLR 447.

<sup>74</sup> For the outcome see *infra* n.134.

<sup>75</sup> [1983] 2 AC 751.

<sup>76</sup> *Duke v. GEC Reliance* [1987] IRLR 139 (CA). For the 1979 decision see *supra* n.12.

<sup>77</sup> *Duke v. GEC Reliance* [1988] IRLR 118 (HL).

<sup>78</sup> *Foster v. South Glamorgan Health Authority* [1988] IRLR 277.

compensation (provided for in s.65(2) SDA) which she could receive for her discriminatory dismissal breached Art.6 ETD. The IT which first heard *Marshall No.2* in 1988 accepted this and disapplied the statutory limit by directly applying Art.6 ETD. The EAT allowed an appeal against this decision the following year on the ground that Art.6 ETD was not directly effective.<sup>79</sup> This argument went on to have untold effects in the UK in the 1990s.<sup>80</sup>

In the 1980s, Community law 'arrived' in one other very significant way. In *ex parte Schaffier*,<sup>81</sup> for the first time, a claim was taken before a UK court on the sole ground of breach of supranational equality provisions, without any reference or support being sought from national sex equality provisions.<sup>82</sup> The method employed in this case of using judicial review in combination with the direct invocation of supranational sex equality provisions in the UK courts was to prove popular in the following decade.

## **2.3 The 1990s: the necessity to have systematic recourse to Community law**

### **2.3.1 The exception to the Community law recourse rule: non-comparative direct discrimination issues**

In the 1990s, the interplay between national and supranational sources became intense and very widespread. The only parts of the SDA map which remained untouched by Community sources were issues of direct discrimination which did not involve difficult issues of comparison. These concerned principally the resolution and development of two issues already considered in the 1980s: (i) the test for direct discrimination within s.1(1)(a) SDA and (ii) how to draw inferences to establish a case of direct discrimination. With regard to the former, the House of Lords in a

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<sup>79</sup> For the IT decision see [1988] IRLR 325; for the EAT decision see [1989] IRLR 459.

<sup>80</sup> See *infra* Section 2.3.5.3.

<sup>81</sup> Discussed *supra* at n.44.

<sup>82</sup> Litigants also began to explore what other employment rules could be attacked by using EC sources. In *Secretary of State v. Levy* [1989] IRLR 469 it was unsuccessfully argued that a statutory payment from the redundancy fund was pay in the Article 119 sense.

seminal judgment in *James*<sup>83</sup> considered the opposing positions of the 'reasoned' approach and the 'causative link' approach which had developed in the 1980s and decided categorically in favour of the 'causative' approach. Hence, in addressing the question as to whether an individual has been less favourably treated on 'the ground of her sex' tribunals have to ask whether the woman would have been so treated 'but for her sex'. With regard to the latter, it will be recalled that while it had been decided that the correct approach was to draw inferences of discrimination from the primary facts, it remained unclear whether ITs should draw such an inference or merely could do so. Decisions by the Northern Ireland Court of Appeal and the Court of Appeal indicated that tribunals should draw such an inference.<sup>84</sup> This was placed in doubt by a subsequent EAT decision which held that it was merely open to a tribunal to draw such an inference.<sup>85</sup> The current case law position seems to be that tribunals are not only entitled to make such an inference, but that it is legitimate for them to do so.<sup>86</sup> This places the onus on tribunals to draw an inference from the primary facts, without obliging them to do so.

### 2.3.2 The 'soft' touch of Community law: sexual harassment in the British courts

Another area of direct discrimination only had the occasional 'soft' touch of Community law. This soft touch was the use of the EC Code of Practice on measures to combat sexual harassment.<sup>87</sup> Whether or not courts referred to this piece of soft law has thus far provided a failsafe guide as to whether the claim of sexual harassment will be accepted as sex discrimination or not. However, the first case in the 1990s, *Bracebridge v. Derby*,<sup>88</sup> illustrated that courts could be sensitive to the impact of harassment on working women even when the EC Code of Practice had not yet come into existence. In this case, the EAT held that a single act of harassment could constitute a

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<sup>83</sup> *James v. Eastleigh Borough Council* [1990] IRLR 288 (HL); for an application of this test see *Bain v. Bowles and others* [1991] IRLR 356 (CA).

<sup>84</sup> *Dornan v. Belfast City Council* [1990] IRLR 179 (NICA); *Baker v. Cornwall City Council* [1990] IRLR 194 (CA).

<sup>85</sup> *British Gas plc v. Sharma* [1991] IRLR 101.

<sup>86</sup> *King v. Great Britain-China Centre* [1991] IRLR 513 (CA).

<sup>87</sup> EC Recommendation on the dignity of men and women at work with the attached Code of Practice on measures to combat sexual harassment (COM C(91) 2625, 27 November 1991).

<sup>88</sup> *Bracebridge Engineering Ltd. v. Darby* [1990] IRLR 3.

'detriment'. Furthermore, the employee was entitled to resign and treat herself as constructively dismissed by reason of the employer's failure to treat her allegation of sexual harassment sufficiently seriously. This failure may constitute a breach of the implied contractual term of mutual trust, confidence and support which, according to the EAT, is extremely important for female staff in this type of situation.

The EC Code of Practice was used to great effect by the EAT in both *Wadman* and *Insitu Cleaning Co.*<sup>89</sup> In the former, the EAT set aside a very dubious IT decision which had found that, while the conduct complained of did constitute sexual harassment, it did not constitute sex discrimination. The EAT went on to provide extensive guidance to ITs deciding sexual harassment cases and directed them specifically to the terms of the EC Code of Practice. In the latter case, the EAT made repeated reference to the precise terms of the Code in formulating its rejection of the argument that a remark about a woman's breasts could be compared with a remark in relation to a man's beard or balding head. As the EAT flatly stated, one is sexual, the other is not. The lay members of the EAT in this case went on to make a number of suggestions to the employer on how to approach the issue of setting up internal procedures to deal with sexual harassment effectively, quickly and sensitively.

In *Stewart*<sup>90</sup> the EAT showed less awareness of the forms sexual harassment may take. While deciding that working in an environment where female nude pin-ups were displayed was a 'detriment' to Mrs Stewart, it also held that it was not less favourable treatment on grounds of sex as the display was potentially just as offensive to men as to women.

Recently, a new, and very disturbing trend, has appeared in harassment cases. The courts have begun to restrictively interpret when the harasser is acting 'in the course of his employment' in order to exclude employer liability. In *Tower Boot Co. Ltd v. Jones*,<sup>91</sup> Mr Jones was subjected to

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<sup>89</sup> *Wadman v. Carpenter Farrer Partnership* [1993] IRLR 374; *Insitu Cleaning Co. Ltd and another v. Heads* [1995] IRLR 4.

<sup>90</sup> *Stewart v. Cleveland Guest (Engineering) Ltd* [1994] IRLR 440.

<sup>91</sup> [1995] IRLR 529. But see now the Court of Appeal decision in this case *Jones v. Tower Boot Co Ltd* [1997] IRLR 168 and *Burton v. De Vere Hotels* [1996] IRLR 596. Both cases firmly turn away from deciding cases under the discrimination statutes by reference to concepts imported from the law of tort, such as the employer's vicarious



severe racial harassment by his colleagues including being whipped, burnt with a hot screwdriver and repeatedly verbally insulted. The EAT, in a majority decision, held that the harassers were not acting in the course of their employment as this phrase covered only unauthorised wrongful acts of servants which were so connected with that which they had been employed to do as to be a way of doing it.

In *Waters*,<sup>92</sup> this restrictive interpretation was combined with the restrictive interpretation of the statutory protection against victimisation developed in the 1980s<sup>93</sup> to seriously undermine the position of women who wish to pursue sexual harassment claims. Ms Waters' allegation of serious sexual assault by a fellow police officer in 1988 resulted in an internal inquiry but no action being taken against the male officer. In 1991, she was removed from a list of specially trained officers. She claimed that this constituted victimisation contrary to s.4(1)(d) SDA consequent upon her allegation of sexual assault against the male officer. Both the IT and the EAT agreed that her claim must fail on the ground that s.4(1)(d) imposes a requirement that the act which the person victimised alleges has been committed by the discriminator must be one which would amount to a contravention of the SDA. As the male officer was not acting 'in the course of his employment', there was no breach of the SDA by the employer and therefore her claim of victimisation was automatically excluded.

Ms Waters attempted to refute both these restrictive interpretations by pointing to Art. 7 of the ETD which requires Member States to take the measures necessary 'to protect employees against dismissal by the employer as a reaction to *a complaint within the undertaking* or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment'. The EAT rejected this on the ground that it would amount to a substantial rewriting of the national provisions which could not be justified, even by reference to the terms of the ETD. Further debate on court utilisation of hard and soft EC provisions in the area of sexual harassment seems

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liability for torts committed by employees or foreseeability. The Court of Appeal in *Tower Boot*, allowing the appeal, stated that 'to construe the words "course of employment" in the statutory context in accordance with the common law doctrine of tortious liability would mean that the more heinous the act of discrimination, the less likely it would be that the employer would be liable. That would cut across the whole legislative scheme and [its] underlying policy'.

<sup>92</sup> *Waters v. Commissioner of Police for the Metropolis* [1995] IRLR 531.

<sup>93</sup> See *Cornelius supra* at n.27.

guaranteed.

### **2.3.3 Resisting the inevitable: comparator problems, British courts and Community sources**

Four areas of direct discrimination raised comparator problems in the 1990s. The most significant of these was pregnancy, which is discussed in detail in Chapter 5.<sup>94</sup> In terms of the interplay of national and supranational sources, the pregnancy cases clearly demonstrate that even where the courts did not want to adopt the EC law solution, they were forced into dodging or misconstruing ECJ interpretations of supranational sources in order to achieve their desired result. In an area such as pregnancy with an established ECJ jurisprudence, the option of blithely ignoring EC law no longer exists and this strategy is bound to have an enduring attraction for UK courts but a limited purchase.

Two of the other three areas hark back to issues which had been dismissed as non-sex discriminatory in the 1970s, lain dormant in the 1980s and re-emerged in the 1990s. They concern, respectively, the issue of different dress codes for men and women at work<sup>95</sup> and the protection of transsexuals by sex equality provisions.<sup>96</sup> The third concerned the protection of homosexuals under the terms of sex equality sources. Broadly speaking, the English courts have been unsympathetic to claims which they see as not conforming to the statutory definition of direct discrimination, while courts in Northern Ireland and the ECJ have been more willing to construe sex equality sources in a way which affords some protection in these areas. The emergence of these issues in this decade also signals a greater desire by individuals and pressure groups to use sex discrimination laws to challenge standard understandings of sex and gender. In England, where ITs have not short circuited access to the higher courts by making a preliminary reference to the ECJ, judges in higher courts have been, without exception, unprepared to allow arguments on the re-interpretation of national provisions or the influence of the ETD to sway them towards realigning their understandings of sex and gender.

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<sup>94</sup> In particular Section 3.3.5.

<sup>95</sup> See *supra* the discussion of *Schmidt v. Austicks Bookshops* at n.10 and accompanying text.

<sup>96</sup> See *White v. British Sugar Corporation* discussed *supra* at n.9 and accompanying text.

### 2.3.3.1 Comparator problems: dress codes, homosexuals and transsexuals

Ms Burrett, a nurse, had to wear a cap which male nurses were not required to wear. She was disciplined when she refused to wear one. Mr Blaik, a postal worker, was required to wear a tie whereas his female colleagues were required to wear a blouse. He was dismissed for his persistent refusal to wear a tie. Mr Smith was employed in a supermarket where long hair was banned for male, but not female, employees. He was dismissed for refusing to get his hair cut. All three claimed that the employers' actions were sex discriminatory. The appellate judges in all three instances rejected these claims by giving their judicial blessing to the 'different but equal' formula in the 1970s *Schmidt* case.<sup>97</sup> The most expansive articulation of this formula is found in *Smith*. According to the Court of Appeal, rules concerning appearance will not be discriminatory because their content is different for men and women if they enforce a common principle of smartness or conventionality, and taken as a whole and not garment by garment or item by item, neither gender is treated less favourably in enforcing that principle. A restriction may only be discriminatory in those cases where, considered in the context of the dress code as a whole, it results in one sex being treated less favourably than the other. Underpinning this reasoning is the assumption that men and women, so far as dress codes are concerned, are not alike for the purposes of the comparison required by s.5(3) SDA.

The lay members of the EAT in *Smith* made a limited inroad into the blanket application of *Schmidt*. They disagreed with the legal chair's application of *Schmidt* on the ground that *Schmidt* could be distinguished as it did not address issues of appearance which extend beyond working hours, such as a restriction on hair length, which detrimentally affects individual choice both in and outside the workplace. They concluded that since the employer restricted only the hairlength of men, its treatment of Mr Smith was self-evidently less favourable and sex discriminatory. As we have seen, the Court of Appeal allowed an appeal against this decision and reinstated the *Schmidt* formula.

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<sup>97</sup> *Burrett v. West Birmingham Health Authority* [1994] IRLR 7 (CA); *Blaik v. The Post Office* [1994] IRLR 280; *Smith v. Safeway plc* [1995] IRLR 132; [1996] IRLR 456 (CA).

Examination of *McConomy v. Croft Inns*,<sup>98</sup> a case decided by the High Court of Northern Ireland, further demonstrates that the 'different but equal' interpretation of the SDA is by no means inevitable. The County Court had decided that ejecting a man from a public house because he was wearing earrings was not discriminatory. The High Court stated that the man had been less favourably treated than a woman and had not been served 'in the like manner and on like terms' as were normal in the case of women. The court went on to say that the 'like for like' comparison required by the legislation made no difference to this conclusion. In comparing 'like with like' account had to be taken of certain basic rules of human conduct which might permit or require different dress regulations for men and women. However, it was impossible to say, in today's conditions, that circumstances were different as between men and women as regards the wearing of personal jewellery or other items of personal adornment. This formula at least has the merit of permitting a dynamic rather than a static interpretation of the compatibility of dress codes with sex discrimination legislation.

Finally, attempts to plead supranational provisions before the courts in dress codes cases have met with an extremely frosty reception. Mr Blaik made his claim under both the SDA and the ETD. The EAT held that the IT had been right not to entertain his EC law claim on the grounds that where a sufficient remedy was given by national law, it was unnecessary and impermissible to explore the same complaint under the ETD's provisions where no significant disparity existed between the relevant national legislation and the ETD. Similarly, the Court of Appeal in *Smith* stated that a preliminary reference to the ECJ would be inappropriate.

The possibility for dismissed homosexuals to obtain the protection of either national or supranational provisions has also been given shortshrift by the English courts on the ground that neither the SDA nor the ETD mention sexual orientation or preference.<sup>99</sup>

A breach in this impasse has been provided by ITs who have been prepared to short circuit the

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<sup>98</sup> [1992] IRLR 561; for a fuller discussion of comparative judicial treatment of dress codes and sex discrimination laws see Flynn, 'Gender Equality Laws and Employers' Dress Codes', 24 *ILJ* (1995) 255.

<sup>99</sup> *R. v. Ministry of Defence ex parte Smith, ex parte Grady*; *R. v. Admiralty Board of the Defence Council ex parte Lustig-Prean, ex parte Beckett* [1995] IRLR 585 (Div. Ct) and [1996] IRLR 100 (CA); *Smith v. Gardner Merchant* [1996] IRLR 342.

appellate courts in the UK and make a reference directly to the ECJ. Thus, Ms P, a male to female transsexual, who was dismissed when she informed her employer of her impending sex change, was fortunate that the IT which heard her case took a less sanguine view of the congruence of EC law requirements with current interpretations of the SDA and, instead, referred the matter to the ECJ. The ECJ held that transsexuals were protected by the ETD by comparing the 'two sexes' of the transsexual and finding that Ms P was treated worse as a woman than as a man.<sup>100</sup> Whether this test, which differs from the straightforward causative, non-comparative test adopted by AG Tesouro bodes well for homosexuals finding protection within Community equality provisions is debatable. A reference on this issue has now been made by a Southampton IT.<sup>101</sup> What is not debatable is that the appellate courts in Great Britain are reluctant to admit the potential incompatibility of their SDA comparator constructions with the ETD lest a referral to the ECJ should become necessary and threaten the existence of those very constructions.

#### 2.3.4 Indirect discrimination

The most important indirect discrimination cases of the decade were not taken under the SDA but under the ETD. These cases will be discussed in the next section which focusses specifically on the use of Community law.

However, as we have seen, cases decided by the ECJ on Art. 119 can have a potentially important impact on the various limbs of the SDA definition of indirect discrimination. In the 1980s, *Bilka* set down a new test for justification of a *prima facie* situation of indirect discrimination. In the 1990s, *Enderby*, an equal value case, set out new criteria which had the potential to alter two more of the SDA indirect discrimination limbs: the need for a requirement or condition; and working out whether a considerably smaller proportion of women than men are affected.

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<sup>100</sup> Case C-13/94 *P v. S and Cornwall County Council* [1996] IRLR 347 (ECJ).

<sup>101</sup> Case C-249/96, *Grant v. South West Trains*, involves the denial of a travel pass for an employee's lesbian partner where a male partner would have been so entitled. The IT has asked whether this contravenes Art. 119 and Art. 1 EPD. *P v. S* has also been used to reopen the issue of the legality under EC law of the dismissal of homosexuals from the armed forces; see 69 *EOR* (1996) 2 and the reference to the ECJ made by the High Court in *R v. Secretary of State for Defence ex parte Perkins* on 13 March 1997 reported in 564 *IRLB*, April 1997, 16. The case involves a former Royal Navy medical assistant who was dismissed because of his homosexuality. See also Skidmore, 'Sex, Gender and Comparators in Employment Discrimination', 26 *ILJ* (1997) 51.

This potential impact of a British equal value case on the definition of indirect discrimination in the SDA is both puzzling and somewhat ironic. The puzzle comes in working out where the indirect discrimination argument came from as the UK equal value provisions in the EqPA make no reference to indirect discrimination. The answer (and the irony) derive from the fact that the reference to the ECJ in *Enderby* was necessitated by the insistence of the UK courts on applying the statutory limbs of SDA indirect discrimination to the EqPA; hence Dr. Enderby's claim had failed *inter alia* before the British courts on the grounds that she could not show a requirement/condition.<sup>102</sup> The ECJ in *Enderby* stated that, in order to establish a *prima facie* case of indirect or apparent discrimination which the employer would have to objectively justify, it was sufficient that significant statistics revealing a systematic and disproportionate impact on a largely female group were established.<sup>103</sup> While the UK courts in equal value cases have taken on board the lessons of *Enderby* and cut equal value law free from the definitions of indirect discrimination in the SDA,<sup>104</sup> courts making decisions where the SDA is involved have been much more resistant to the implications of *Enderby* as we shall see in this section.

To see what developments have occurred in indirect discrimination in the 1990s, the schema of outlining developments under each limb of the statutory definition is once again employed to facilitate comparisons with the 1980s.

#### 2.3.4.1 Requirement/condition

In *Briggs*,<sup>105</sup> the court considered whether the demotion of a female teacher for refusing to coach badminton after school one day per week because of child-care responsibilities constituted indirect

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<sup>102</sup> See for example the EAT decision in *Enderby v. Frenchay Health Authority* [1991] IRLR 44.

<sup>103</sup> Case C-127/92, [1993] ECR I-5535. For indepth discussion of what precisely *Enderby* is authority for, see *British Road Services Ltd v. Loughran* [1997] IRLR 92 (NICA).

<sup>104</sup> See the House of Lords decisions in *Ratcliffe v. North Yorkshire County Council* [1995] IRLR 439; *British Coal Corporation v. Smith and others* [1996] IRLR 404. See however, *Tyldesley v. TML Plastics* [1996] IRLR 395 and *Strathclyde Regional Council v. Wallace* [1996] IRLR 670 (CS) for a more restrictive approach to the interpretation of s.1(3) EqPA.

<sup>105</sup> *Briggs v. North Eastern Education and Library Board* [1990] IRLR 81(NICA).

discrimination. The court considered *Clarke, Holmes and Clymo*,<sup>106</sup> and explicitly rejected the reasoning in *Clymo* that a requirement to work full-time could not be a requirement or condition on the grounds that this was too restrictive an interpretation. Similarly in *Staffordshire*,<sup>107</sup> it was accepted that it was a requirement or condition that an employee had to be employed full-time at the date of dismissal in order to qualify for extra service credits for pension purposes.

*Meade-Hill* provides an interesting twist on the need for a requirement/condition.<sup>108</sup> Ms Meade-Hill and her union issued proceedings in the County Court seeking a declaration under s.77(2) SDA that a mobility clause in her contract was unenforceable on the ground that it indirectly discriminated against women. The issue was when the requirement/condition arose: when the term was incorporated into the contract or when it became reasonably foreseeable that it would actually be invoked. The Court of Appeal, in a majority judgment, decided that the inclusion of the contractual term amounted to the application of a requirement or condition notwithstanding that the term had not been invoked.<sup>109</sup>

In *Brook*,<sup>110</sup> however, the applicants were unsuccessful in showing that they had been subject to a requirement or condition. This case involved a London Borough's Public Works Service which had, since 1987, as part of its equal opportunities policy, introduced an Improvers programme, similar to apprenticeship but not limited to under 21s, under which women were taken on in trades such as carpentry, plumbing etc.. It subsequently became necessary to make redundancies. Following consultation with the unions, length of service emerged as the most heavily weighted criterion along with other criteria such as attendance, sickness and conduct. The claimants were women 'improvers' who were recruited as part of the equal opportunities policy and dismissed

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<sup>106</sup> *Supra* at n.42-43.

<sup>107</sup> *Staffordshire County Council v. Black* [1995] IRLR 234; see also *Jones v. University of Manchester* [1993] IRLR 218 where the Court of Appeal said that it could not interfere with an IT decision that an age-range for eligibility for a job was an absolute bar and therefore a 'requirement/condition' rather than a preference.

<sup>108</sup> *Meade-Hill and another v. British Council* [1995] IRLR 478 (CA).

<sup>109</sup> S.77 has been amended twice since its enactment. S.6 SDA 1986 extended the effect of s.77 to collective agreements. S.6 SDA 1986 was further amended by TURERA 1993 so that complaints may be made to ITs where a person believes that a term or rule may at some future time have effect in relation to her. *Meade-Hill* was decided on the pre-1993 formulation.

<sup>110</sup> *Brook and others v. London Borough of Haringey* [1992] IRLR 478.

in application of these criteria. They claimed discrimination under several heads *inter alia*, that apprenticeships were exempted from redundancy and improvers were not, and that length of service was the most heavily weighted criterion. The EAT upheld two findings by the IT on the 'requirement/condition' point. First, the IT was entitled to find that it was not indirectly discriminatory to exempt apprentices but not 'improvers' on the ground that the mere holding of a job or status was not a requirement/condition in that it did not place a rule, policy or barrier in the way of women. Secondly, the IT had not erred in finding that the need to obtain a preset number of points by reference to multiple factors in order to avoid redundancy was not a 'condition'. According to the EAT, a person who is rejected because he (*sic*) is not the best candidate on an amalgam of factors has not been subjected to any particular requirement or condition but has simply failed to defeat his (*sic*) competitors.

*Bhudi*<sup>111</sup> concerned a claim under s.1(1)(b) by part-time female evening office cleaners who were made redundant after management decided that the amount of administration required was disproportionate in relation to the service required and that difficulties arose out of the fact that the cleaners' hours of work necessarily fell outside office hours. Male cleaners were full-time and worked during normal office hours. The IT dismissed the complaint on the grounds that there was no 'requirement/condition'. The women had not been dismissed because they were part-time but because they worked outside the normal hours administered by the personnel department. It so happened that all the cleaners affected were female part-time workers but part-time work was not a requirement or condition applied by the company and the company did not insist on full-time work.

The possibility of construing 'requirement/condition' more generously, or moving away completely from the disastrous interpretations ITs were capable of placing on these words, seemed a real one following the ECJ's *Enderby* decision at the end of 1993.<sup>112</sup> The IT decision in *Bhudi* was appealed on the grounds that, post-*Enderby*, there was no longer any need to show the application of a requirement or condition. This was firmly rejected by the EAT. They stated that, notwithstanding *Enderby*, there was no obligation on a UK court to construe s.1(1)(b) in

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<sup>111</sup> *Bhudi and others v. IMI Refiners Ltd.* [1994] IRLR 204.

<sup>112</sup> *Supra* at n.103.



such a way as to disregard the express provision relating to the proof of a requirement or condition. *Enderby* was solely concerned with Art.119 and the EPD. Even if after *Enderby* indirect discrimination could be established under EC law without the necessity of a requirement or condition, it was impossible to construe s.1(1)(b), which is not open to a divergent interpretation, so as to accord with the EC position. However, the EAT held that the IT had erred in finding that no requirement or condition had been applied. In concentrating on the full-time/part-time argument, the IT had failed to address itself to the further question of whether a requirement/condition was applied by the employers relating to the employees working outside normal hours. This issue was remitted to an IT for consideration.

#### *2.3.4.2 A considerably smaller proportion of women than men can comply*

With one notable exception, higher courts in the 1990s have been more willing to evaluate the choice of 'pool' made by the IT than they were in the previous decade. The exception is *Lea*<sup>113</sup> where, for the first time, a man, who had been turned down for a job on the grounds that it was not open to those in receipt of an occupational pension, successfully claimed indirect discrimination before an IT. The EAT accepted the IT's pool of the 'economically active population' despite the fact that it accepted that this pool could be considered as being too wide. It also accepted the IT's conclusion that as 95.3% of men and 99.4% of women could comply with the requirement not to be in receipt of an occupational pension, a 'considerably smaller' number of men than women could comply on the grounds that it could not be held that no reasonable IT could have come to this conclusion. This decision has been sharply criticised as representing a complete opt-out by the appellate courts leading to an alarming lack of certainty for employers and employees alike.<sup>114</sup> Fortunately, in other cases, the appellate courts have been less reticent to examine the ITs' choices. Thus, in *Briggs*, it was held that the IT had correctly chosen to look at the 'pool' of women teachers rather than women generally. The IT was entitled, in the absence of specific evidence, to rely on their own knowledge and experience to find that the proportion of female married teachers who could comply was considerably smaller than the

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<sup>113</sup> *Greater Manchester Police Authority v. Lea* [1990] IRLR 372.

<sup>114</sup> Rubenstein, 'Highlights', [1990] IRLR 370ff.

proportion of male married teachers.<sup>115</sup>

It is in *Jones v. University of Manchester*,<sup>116</sup> however, that the appellate courts clearly departed from their strategy of non-interference and laid down a series of guidelines for ITs to utilise when making decisions on pool selection and the 'considerably smaller' question. In this case, Ms Jones, who was 42 years old, claimed that an age range of 27-35 for a graduate post indirectly discriminated against women who were mature students. The IT held that the relevant 'pool' for comparison was mature students. The Court of Appeal allowed an appeal against this decision on the grounds that the IT had erred in law in restricting the pool for comparison to mature students. The appropriate pool for comparison was all those men and women with the required qualifications for the post not including the requirement complained of. In this case, that meant graduates with the necessary experience. Following this case, it has become more common for the appellate courts to give advice to ITs or to overturn IT decisions. Thus in *Bhudi*<sup>117</sup> the EAT advised the IT to consider whether, for social or biological reasons, women were more likely than men to find it difficult to work during 'normal' working hours. In *Meade-Hill*,<sup>118</sup> it was accepted that fewer women than men could comply with a mobility clause as judicial notice could be taken of the fact that a higher proportion of women than men would find it impossible in practice to comply with a direction of their employer to move their workplace to a destination which involved a change of home.

In *London Underground v. Edwards*,<sup>119</sup> Ms Edwards, a single parent found, following a change in rostering arrangements, that she could no longer work and be at home in the mornings and evenings to look after her son. When negotiations between management and unions on special arrangements for single parents failed, she resigned and claimed that she had been discriminated against. The IT held that a *prima facie* case of indirect discrimination had been established

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<sup>115</sup> *Supra* at n.105.

<sup>116</sup> *Supra* at n.107.

<sup>117</sup> *Supra* at n.117.

<sup>118</sup> *Supra* at n.118.

<sup>119</sup> [1995] IRLR 355.

because a considerably smaller number of male single parents than female single parents could comply. The EAT held that the IT had erred in law. A pool consisting only of single parent train operators was the wrong pool for comparison. The correct pool for comparison was that of all train operators to whom the new rostering arrangements applied, and the proper question was whether the requirement relating to availability for rostering arrangements was such that a considerably smaller proportion of women qualified to be train operators than of men so qualified could comply with it. A second IT then found that while 100% of (2,023) male train operators could comply with the new rostering requirements, all of the 21 female train operators bar Ms Edwards could comply, that is 95.2%. However, it considered that it was important to have regard to the absolute numbers of men and women in the comparator groups and the fact that women are more likely to be single parents. On this basis they concluded that considerably fewer women could comply. The EAT<sup>120</sup> upheld this purposive approach to the question of disparate impact in a judgment which demonstrates a high level of perception and sensitivity to the problems women as a group face on the labour market. In particular, the emphasis is shifted from examining solely arguments about relative proportions in a particular group to examining the fact that, in absolute terms, there are almost 100 times as many men as women in the group. This absolute numbers (rather than proportions) approach has many merits which the EAT point out. First, it may indicate a generalised assumption that the work is 'men's work'. Second, it clearly reveals the proportions to be misleading as they are based on a statistically unreliable number of women. To remedy this, the IT is entitled to take a wider perspective and consider what the disproportionate impact of the condition might have been had the pool of women been larger. The EAT's approach thus shifts the focus from being a statistical game of chance on the day the condition is applied to examining the impact of applying such a condition in a broader labour market and childcare context.

In all of these cases, the 'pool' issue fell squarely within the terms of the SDA. In *Staffordshire County Council v. Black*,<sup>121</sup> however, Ms Black made a claim both on the SDA and Art. 119, thus raising again the potential application of *Enderby*. The Council decided to credit part-time teachers over 50 only with their contractual hours of service while full-timers over 50 were

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<sup>120</sup> *London Underground Ltd v. Edwards (No.2)* [1997] IRLR 157.

<sup>121</sup> *Supra* at n.107.

credited with their actual hours of service in the awarding of additional periods of service for pension purposes in a redundancy package. The IT dismissed the SDA claim on the grounds that the proportion of women teachers over 50 who could comply with the full-time requirement (89.5%) was not considerably smaller than the proportion of male full-time teachers over 50 (97%). The EAT agreed with this conclusion.<sup>122</sup>

However, the IT went on to find that Ms Black had established her claim under Art.119. Relying on *Bilka*, it held that as more women than men were in part-time employment, the condition affected a 'far greater number of women than men'. This was sufficient to transfer the burden onto the employer to justify which, in the circumstances, they held he had failed to do. The EAT allowed an appeal against this finding, on the ground that in deciding whether there has been indirect discrimination under Art.119 the same test should be applied as is applied under the SDA. The EAT justified this conclusion by relying on what they call the ratio of *Bilka* which referred to the proportion of men and women who work part-time. While it is unlikely on the facts of this case that applying the test in *Enderby* would have changed the outcome, the unwillingness of the British courts in SDA cases to even countenance the possible application of *Enderby* is worrying for all those individuals whose claim falls under the SDA in national law and under Art. 119 supranationally.

#### 2.3.4.3 Justifiability

In most instances, as in the 1980s, the courts apply the national translation (some would say 'watered-down' version) of *Bilka* in *Hampson*,<sup>123</sup> although with differing degrees of rigour. This led the Court of Appeal in *Briggs* to overturn the IT's finding that requiring a teacher to teach badminton one afternoon a week after school was not justified and the EAT in *Lea* to agree that

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<sup>122</sup> Thus demonstrating what the EAT stated in *London Underground v. Edwards (No.2)*: that a narrowly-defined pool and a solely proportion-based approach will often lead to the exclusion of classic examples of indirectly discriminatory practices - such as those against part-time workers - from the protection of the legislation on a particular set of facts.

<sup>123</sup> *Hampson v. Department of Education and Science* [1989] IRLR 72 (CA). In this case, Balcombe LJ stated, 'in my judgment 'justifiable' requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition'. He went on to state, 'I can find no significant difference between the test adopted by Stephenson LJ in *Ojutiku* and that adopted by the House of Lords in *Rainey*.'

the police's policy of excluding those in receipt of an occupational pension from jobs was not justifiable.<sup>124</sup> In *London Underground*<sup>125</sup> the EAT stated that if the IT had applied the correct test, and had come to a conclusion for which there was some evidence, that decision should not be disturbed on appeal. Hence, London Underground's new rostering policy was not justified. In *Jones*,<sup>126</sup> continuing the careful and helpful reasoning which characterised their decision on the 'pool', the Court of Appeal held that the IT had misdirected itself in finding that the employers had failed to justify. Rather than examining the discriminatory effect of the requirement as practised by the University of Manchester in this case, the IT had looked at the discriminatory effect of the requirement if permitted to be applied by employers generally. However, the Court of Appeal advised ITs that they were permitted to take into account the particular hardships which lay in the way of Ms Jones. In determining the discriminatory effect of a requirement, ITs are required to ascertain both the quantitative effect - how many men or women are likely to suffer in consequence of the discriminatory effect - and also the qualitative effect of the requirement upon those affected by it - how much damage or disappointment it may do or cause and how long lasting or final the damage is.

Less rigour was displayed by the EAT in *Staffordshire*<sup>127</sup> to disagree with the IT on justification. Without further explanation they stated, 'we are of the view that such a policy was objectively justified and can see that it might reasonably be described as necessary, having regard to the Council's desire not to find extra money...We agree with the proposition that it is for the Council and not the IT to decide how it is to spend its resources.' A similar degree of laxity is found in *Brook*.<sup>128</sup> In reaffirming judicial opinion that length of service is quasi-automatic justification, the EAT stated, 'Employers, trade unions, ACAS and common sense all recognise that length of service is an essential ingredient in any redundancy selection save in the most exceptional of circumstances. Therefore, justification of length of service as a criterion will be a fairly simple

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<sup>124</sup> *Supra* at n.105 and n.113.

<sup>125</sup> *Supra* at n.119 and n.120.

<sup>126</sup> *Supra* at n.107.

<sup>127</sup> *Supra* at n.107.

<sup>128</sup> *Supra* at n.110.

burden for an employer to undertake...To give women preference in a redundancy situation would be to introduce positive discrimination.'

#### *2.3.4.4 Which is to her detriment because she cannot comply*

This was subject to little judicial interpretation in the 1990s. The only decision of note is that of *Briggs* which expressly and forcefully rejected the *Clymo* interpretation of this part of the statutory definition.<sup>129</sup>

### **2.3.5 EC law: the commotion of the commonplace**

#### *2.3.5.1 The continuing battle over s.6(4) SDA*

Following the decision by the House of Lords in *Duke* stating categorically that s.6(4) could not be interpreted to accord with the ETD,<sup>130</sup> a new legal argument was explored by private sector employees seeking to get this provision read in line with the ETD. One of the arguments used by the House of Lords in *Duke* to deny a reading of s.6(4) which accorded with the provisions of the ETD was that the ETD came into force after the SDA and therefore the SDA did not have to be construed in a manner which gave effect to the directive. In *Finnegan*,<sup>131</sup> Northern Irish private sector employees argued that as the equivalent Northern Irish legislation, the Sex Discrimination Order (NI) 1976, came into effect after the ETD, it should be construed in accordance with the directive. This argument was rejected by both the Northern Ireland Court of Appeal and the House of Lords on the grounds that the SDA and its Northern Irish equivalent were identical and it would be wholly artificial to treat the latter, but not the former, as having been introduced to comply with the requirements of Community law.

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<sup>129</sup> *Supra* at n.105 and n.42.

<sup>130</sup> *Supra* at n.77.

<sup>131</sup> *Finnegan v. Clowney Youth Training Programme* [1990] IRLR 299 (HL).

In the wake of *Marleasing*,<sup>132</sup> an ECJ ruling which stated that the obligation to construe national legislation in accordance with Community law applied to both laws passed to implement Community obligations and laws passed prior to the relevant piece of Community legislation, another Northern Irish private sector female employee dismissed at 60 argued that the IT had erred in applying *Duke* and *Finnegan* to her case. This was rejected by the Northern Ireland High Court.<sup>133</sup>

Female employees of national companies who had been dismissed at 60 continued to press for their employers to be classified as 'emanations of the state' in order to allow them to rely on the ETD. The ECJ ruled in *Foster*<sup>134</sup> that a body which has been made responsible, pursuant to a measure of the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is an 'emanation of the State'. Applying this test, the House of Lords ruled that Ms Foster could rely on the ETD against British Gas and the Court of Appeal ruled that Ms Doughty could not rely directly on the ETD in her claim against Rolls-Royce.<sup>135</sup>

#### 2.3.5.2 Time limits emerge

As ECJ case law emerged making it clear that certain employment practices adopted on the basis of national legislation in fact contravened supranational equality sources, litigants came before the courts arguing that time should begin to run only either from the date when an ECJ judgment made it clear that supranational sources had been contravened, or when the UK legislature modified the national rule so as to accord with the EC equality source. In so doing, they relied on

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<sup>132</sup> Case C-106/89 *Marleasing v. La Comercial Internacional De Alimentacion SA* [1990] ECR 4135.

<sup>133</sup> *Porter v. Cannon Hygiene Ltd.* [1993] IRLR 329. Ms Porter subsequently brought a *Francovich* action against the Attorney-General for five years' lost earnings which resulted in a settlement: McCaffrey, 'Equal Treatment, Unequal Retirement Ages and the *Francovich* claim', 25 *ILJ* (1996) 144.

<sup>134</sup> Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313. It is a moot point whether the two limbs of the test are cumulative or alternative as the ECJ used both formulations in its judgment. The British courts have tended to require both limbs to be satisfied: see further Moore, 'Enforcement of Private Law Claims of Sex Discrimination in the Field of Employment', in T.K. Hervey and D. O'Keeffe (eds) *Sex Equality Law in the European Union* (Wiley: Chancery, 1996) 139 at 142.

<sup>135</sup> *Foster and others v. British Gas* [1991] IRLR 268 (HL); *Doughty v. Rolls Royce plc* [1992] IRLR 126.

the 1991 *Emmott* judgment in which the ECJ held that where a litigant relies upon a directive, the Member State cannot rely upon domestic time limits to bar the claim if the directive has not been properly implemented into national law at the date of the claim.<sup>136</sup>

In April 1990, Mr Livingstone signed a COT3 agreement drawn up by a conciliation officer settling all claims against his employer. In May 1990, the *Barber* judgment was handed down by the ECJ. In the light of that judgment, in July Mr Livingstone presented a claim alleging that he had been discriminated against contrary to the SDA and to EC law. The IT held that it had no jurisdiction to hear the claim because of the COT3 agreement. The EAT allowed an appeal against this decision on the grounds that as a COT3 agreement could not bar SDA or EqPA claims under national law, it could not block claims under EC law. The EAT directed itself according to the ECJ decision in *Emmott* and concluded that the proper approach was to apply the procedures of the SDA, including those relating to time limits and the code intending to protect employees against bad bargains, to claims of sex discrimination relying directly on Community law. The procedural conditions of domestic law complied with the conditions indicated by the ECJ in *Emmott*, that is, that procedures for Community claims should not be less favourable than those of similar provisions of national law and should not render virtually impossible the exercise of Community law rights. This was a fairly straightforward case where Mr Livingstone wished simply to rely on the time limits in the SDA.<sup>137</sup>

Less straightforward is the situation where it is the time limits in the SDA itself which are challenged. This happened in *Cannon v. Barnsley*.<sup>138</sup> Ms Cannon, a public sector employee, was made redundant in 1985, two months before her 60th birthday. Her redundancy pay entitlement was reduced by ten twelfths in accordance with the tapering provisions in para 4 of Schedule 4 to EP(C)A 1978 which at that time proportionately reduced pension payments for women over 59 whereas payments to men were not so reduced at that age. This difference in treatment was removed in the 1989 Employment Act with effect from 16 January 1990. In February 1990, Ms Cannon lodged a claim arguing that she had been discriminated against contrary to European law.

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<sup>136</sup> Case C-208/90 *Emmott v. Minister for Social Welfare and Attorney General* [1991] ECR I-5535.

<sup>137</sup> *Livingstone v. Hepworth Refractories plc* [1992] IRLR 63.

<sup>138</sup> *Cannon v. Barnsley Metropolitan Borough Council* [1992] IRLR 474.



Her claim was rejected by the IT which considered that her complaint had to be considered under the SDA and was therefore outside the three month time limit.

The EAT, in a rigorous application of both the letter and the spirit of *Emmott*, allowed an appeal against this decision on three main grounds. First, the IT had been wrong to decide that the claim could only be considered under domestic law and that the claim was therefore out of time. Before 1990, the UK provisions clearly discriminated between men and women in a manner which infringed Art. 119, the EPD and the ETD. As Ms Cannon was employed by an 'emanation of the State', she had a right to rely on the directives. Secondly, where a right claimed was a Community law right rather than a domestic law right, *Emmott* contained the authoritative set of applicable principles. While no UK provision set out a time limit in respect of EC law claims, this did not mean that no time limits whatsoever could be placed on EC law claims. Rather, time limits for EC law claims could be evolved, if necessary by analogy to statutory or common law periods for bringing similar claims. Using those criteria, the statutory limit of six months for bringing redundancy payment claims could be applied by analogy. However, thirdly, in accordance with *Emmott*, the State (and its emanations) were disabled from relying on the running of a time period until the day when the failure of the State to comply with its obligations has been made good. In this case that meant the 16 January 1990, the day when the legislation removing the discrimination came into force.

A similarly purposive approach to time limits in the light of EC law was shown in *Rankin*.<sup>139</sup> Ms Rankin did not receive a redundancy payment when she was dismissed at the age of 61 in 1987 because, at that time, a difference in treatment between men and women aged 60 and 65 still existed. She lodged a claim within three months of the relevant provisions of the Employment Act 1989 coming into force. The EAT rejected the argument that the time for bringing a claim directly under Art. 119 should be held to begin with the date of her redundancy. Instead it held that time should begin to run only on the date when it could reasonably be said to be clear to any person affected that such a claim could be made. It also held that Art. 119 claims must be subject to some time limits in order to give effect to the principle of legal certainty. In this case, Ms Rankin's claim was not out of time.

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<sup>139</sup> *Rankin v. British Coal Corporation* [1993] IRLR 69.

Therefore, at the beginning of the 1990s, both EC principles and their application by UK courts paved the way for claimants - who discovered in the wake of an ECJ judgment that they had rights denied to them by national legislation - to pursue their claims within a reasonable time limit of the ECJ judgment or the State having righted its wrong.

#### *2.3.5.3 Upper limits on SDA compensation*

Mrs Marshall's second round,<sup>140</sup> where she argued that Art.6 ETD made it impossible to maintain the upper limit on compensation in s.65(2) SDA, was unsuccessful before the Court of Appeal, and was referred to the ECJ, where her arguments prevailed for a second time.<sup>141</sup> The ECJ held that Art.6 ETD gives individuals a directly effective right to challenge the effectiveness of remedies provided by Member States. An upper limit on compensation would prevent full redress for the discrimination suffered and was therefore incompatible with Art.6.

#### *2.3.5.4 The big targets*

Three sets of proceedings illustrated the qualitative and quantitative impact of Community sex equality sources on State-endorsed employment policies. The ingredients which produced these stunning outcomes in these cases were not new. All involved judicial review by the EOC or private individuals and the argument that national legislation contravened the ETD and/or Article 119. Two involved the argument that certain employment rules indirectly discriminated against women. One involved the argument that to dismiss pregnant women contravenes the ETD. As we have seen, all of these issues had been argued before British courts on many previous occasions. What was new was seeing that, put together, these ingredients could have a lethal effect on State-level employment provisions and policies which either excluded women from the labour market *per se* or excluded more women than men from obtaining employment protection rights at work. What was also new was to see the UK courts reason their decisions entirely on the basis of

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<sup>140</sup> See *supra* n.79 and accompanying text.

<sup>141</sup> Case C-271/91 *Marshall v. Southampton and South West Hampshire Area Health Authority (No.2)* [1993] ECR I-4367.

supranational norms and jurisprudence, and to declare with equanimity that certain key aspects of British employment rules contravened European law.

In the first such challenge,<sup>142</sup> it was unnecessary for a court to even come to a decision. The EOC challenged in judicial review proceedings the Ministry of Defence's policy of automatically dismissing pregnant service women as contrary to the ETD.<sup>143</sup> This policy was excluded from challenge under the SDA because of s.85(4). The Ministry of Defence conceded liability before the Divisional Court in 1991 after which approximately 5000 ex-service women who were unlawfully dismissed for pregnancy lodged claims.

In the second case,<sup>144</sup> the EOC challenged provisions of the EP(C)A 1978 which made rights for employees wishing to bring a claim for unfair dismissal or a statutory redundancy payment conditional upon the claimant having worked sixteen hours per week for two years or eight hours per week for five years on the ground that these thresholds were contrary to EC law by indirectly discriminating against women. The case wound a chequered path through the courts. The Divisional Court held that the Secretary of State had made a 'decision' which was susceptible to judicial review, that the EOC had locus standi to take judicial review proceedings, that unfair dismissal compensation was 'pay' within the meaning of Art.119, but that the Secretary of State had objectively justified his decision to make the rights conditional on service qualifications. The Court of Appeal stated that the Secretary of State had taken no 'decision' susceptible to judicial review, that the EOC did not have locus standi and that the appropriate forum for such a challenge was the commencement of infringement proceedings by the Commission under Art.169. The House of Lords handed down a decision which is remarkable in its refusal to flinch from the logical consequences of the application of Community sources. In a decision which is entirely bereft of reference to national indirect discrimination case law, the House of Lords decided that as the EOC had encountered no arguments preventing it from having locus standi in previous

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<sup>142</sup> *R v. Secretary of State for Defence ex parte Leale, Lane and EOC* (unreported).

<sup>143</sup> A challenge prompted by the ECJ's decisions in *Dekker* and *Hertz*. For detailed discussion of these decisions see Chapter 5.

<sup>144</sup> *R v. Secretary of State for Employment ex parte EOC* [1992] ICR 341 (Div.Ct); [1993] IRLR 10 (CA); [1994] IRLR 176 (HL). This case will be referred to as *ex parte EOC*.

cases, it would be retrograde to retreat now and deny it locus standi here. It applied the *Rinner-Kühn* test<sup>145</sup> to decide that the Secretary of State had failed to show objective justification. While increasing part-time work was held to be a necessary aim, the threshold provisions had not been shown to be suitable and requisite for achieving that aim. The House of Lords did not come to any definite conclusion as to whether unfair dismissal compensation was 'pay' for the purposes of Art. 119. It issued two declarations. The first stated that the provisions of EP(C)A whereby employees working less than sixteen hours per week were subject to different conditions in respect of qualification for redundancy pay from those working sixteen hours or more per week contravened Article 119 and the ETD. The second was couched in similar terms for unfair dismissal compensation, except that it was declared that this contravened only the ETD, and not Art. 119. The declarations therefore left two issues unclear. The first was whether unfair dismissal compensation was 'pay'. The second was whether the declarations applied only to the sixteen hour threshold or applied to both the eight hour and the sixteen hour threshold.

In the third case, *ex parte Seymour-Smith and Perez*,<sup>146</sup> two women, supported by a law centre, took judicial review proceedings following their inability to claim unfair dismissal because they lacked the two years' continuous service required by s.64(1) EP(C)A 1978. They argued that the Unfair Dismissal (Variation of Qualifying Period) Order 1985 which had increased the qualifying period from one year to two years was, unless objectively justified, indirect discrimination contrary to the ETD because the proportion of women who could comply was considerably smaller than the proportion of men who could do so. They sought an order of certiorari to quash the 1985 Order. The Divisional Court held that certiorari would not be appropriate and that it had not been shown that a considerably smaller proportion of women than men could comply but that, if this had been demonstrated, the Secretary of State had no objective justification.

The Court of Appeal allowed the applicants to amend their claim to argue that unfair dismissal compensation was 'pay' and that, by making and maintaining in force the 1985 Order, the UK was

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<sup>145</sup> Case 171/88 *Rinner-Kühn v. FWW Spezial Gebäudereinigung GmbH* [1989] ECR 2743. This adapts *Bilka supra* at n.45 to legislative measures: to justify Member States must show that the means chosen met a necessary aim of its social policy and that the legislation was suitable for attaining that aim.

<sup>146</sup> *R v. Secretary of State for Employment ex parte Seymour-Smith & Perez* [1995] IRLR 464 (CA). The House of Lords gave judgment in this case on 13 March 1997.

in breach of Art.119. It held that in the period complained of (1985-1991) disparate adverse impact had been established. There had been and continued to be a considerable and persistent difference between the numbers and percentages of men and women who complied with the two year qualifying requirement. To reach this decision, the Court of Appeal examined in great detail eight decisions of the ECJ on how to establish a *prima facie* case of indirect discrimination.<sup>147</sup> The Court of Appeal went on to hold that the two year qualifying period was not objectively justified as none of the empirical evidence produced had been directed towards the specific issue of moving from a one to a two year threshold. The court refused to quash the 1985 Order on the ground that this would be inappropriate for various reasons and instead declared the Order to be in breach of the ETD. The House of Lords discharged the declaration made by the Court of Appeal. It did so on the ground that such a declaration would serve no purpose, given that the ETD could not affect the rights and duties of two private parties: the applicants and their employers. To give a declaration would permit the applicants, by a easy two-stage process of judicial review and an IT action, to obtain a result equivalent to giving directives horizontal direct effect. The House of Lords also noted that as the declaration made by the Court of Appeal applied only to the period 1985-1991, and there was possible evidence that the ratios of men and women who qualified had subsequently narrowed, neither enabled the employees to claim unfair dismissal nor placed the Government on notice that the law had to be amended. It referred a number of questions to the ECJ.

The *ex parte EOC* decision, as we saw, left two issues unclear: was the eight hour threshold in breach of the ETD; was unfair dismissal compensation 'pay' within the meaning of Art.119? The latter issue was evidently central for private sector employees who could not rely on the ETD. It was not long before the lower courts were confronted with these issues. In *Warren v. Wylie*,<sup>148</sup> an IT considered the unfair dismissal claim of a shop assistant who prior to her dismissal in October 1993, had worked for seven hours a week. The IT held that *ex parte EOC* applied to the

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<sup>147</sup> Case 96/80 *Jenkins v. Kingsgate (Clothing Productions) Ltd* [1981] ECR 911, *Bilka-Kaufhaus supra* at n.45, Case 30/85 *Teuling-Worms v. Bestuur van de Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 2497, *Rinner-Kühn supra* at n.145, Case 102/88 *Ruzius-Wilbrink v. Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR 4311, Case C-33/89 *Kowalska v. Freie und Hansestadt Hamburg* [1990] ECR I-2591, Case C-184/89 *Nimz v. Freie und Hansestadt Hamburg* [1991] ECR I-297 and Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin v. Bötzel* [1992] ECR I-3589.

<sup>148</sup> [1994] IRLR 316 (IT).

eight hour threshold as well as the sixteen hour threshold on the basis that Lord Keith's speech referred to 'thresholds' in the plural. Furthermore, the IT decided that unfair dismissal compensation was 'pay' for Art.119 purposes. While the House of Lords was unclear on this point, the majority of the Court of Appeal had said it was 'pay' and the IT was bound by that decision.

The 'pay' part of this decision was reiterated by a court of higher authority (EAT) in *Mediguard v. Thame*<sup>149</sup> which held that part-time employees of private sector employers with at least two years service could rely upon Art.119 to bring an unfair dismissal complaint.

The 'threshold' part of the IT decision was given greater authority by the EAT decision in *Clifford v. Devon County Council*<sup>150</sup> which held that a public sector worker employed less than eight hours per week was entitled to bring an unfair dismissal complaint. The combined effect of these two EAT decisions in 1994 was that all employees with two years service, irrespective of the number of hours they worked per week or whether they were public or private sector employees, could bring an unfair dismissal complaint by relying on EC law.

The Court of Appeal in *Seymour-Smith* eradicated the two year service requirement. However, the Court of Appeal disapproved of the EAT's decision in *Mediguard* that unfair dismissal compensation was clearly Art.119 'pay'. The Court of Appeal did not believe this issue to be *acte clair* but refused to take a decision on the issue, on the ground that an appeal to the House of Lords in *Seymour-Smith* was likely. The court seemed reluctant to preempt the House of Lords by taking the decision to refer. Rather, it stated that the House of Lords could either decide the issue or make a reference to the ECJ. The House of Lords in March 1997 referred a series of questions on the construction of Art.119 to the ECJ in *Seymour-Smith*. It has asked whether unfair dismissal compensation is 'pay' within the meaning of Art.119 and if it is, whether the conditions determining whether a worker has unfair dismissal rights fall under the ETD or Art.119. It has also asked a number of questions concerning the test for indirect discrimination in Community law. First, what is the Community law test for establishing the disparate impact of

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<sup>149</sup> [1994] IRLR 504.

<sup>150</sup> [1994] IRLR 628.

a measure. Secondly, when is the disparate impact test to be applied - when the measure is adopted, when the measure is brought into force or when the employee is dismissed. Finally, it has asked the ECJ what are the legal conditions for establishing the objective justification of indirectly discriminatory measures of measures adopted by Member States in pursuance of social policy. More specifically, what material need the Member State adduce in support of its grounds for justification.

#### 2.3.5.5 *The new situation*

These 'big target' cases wrought profound changes in the British labour law landscape. *Marshall No.2* ensured that the statutory cap on compensation in the SDA and its near relative, the Race Relations Act, was removed.<sup>151</sup> *Ex parte EOC* provoked the introduction of Regulations in 1995 making the number of weekly hours worked by an employee irrelevant for a wide range of statutory employment rights.<sup>152</sup> S.85(4) SDA has been modified.<sup>153</sup> The effect of *Seymour-Smith* on British labour law now awaits decision by the ECJ following the decision taken by the House of Lords to make a preliminary reference.<sup>154</sup> Taken in isolation, each case produced important

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<sup>151</sup> The Sex Discrimination and Equal Pay (Remedies) Regulations 1993 (SI 1993/2798) were made by the Secretary of State for Employment under s.2(2) of the European Communities Act 1972. The Race Relations (Remedies) Act 1994, deriving from a Private Members' Bill introduced with government support repealed the limit in race cases.

<sup>152</sup> The Employment Protection (Part-time Employees) Regulations 1995 (SI 1995/31). The Regulations do more than simply comply with the *ex parte EOC* judgment. See further McColgan, 25 *ILJ* (1996) 43.

<sup>153</sup> See The Sex Discrimination Act (1975) Application to Armed Forces etc Regulations 1994 (SI 1994/3276) which came into force on 1 February 1995. It is highly doubtful whether the new Regulations conform with the ETD as they introduce a new 'combat effectiveness' criterion to exclude the application of the SDA. See further Arnall, 'EC Law and the Dismissal of Pregnant Servicewomen', 24 *ILJ* (1995) 215.

<sup>154</sup> *Supra* at n.146. The outlook for the challenge to the two-year qualifying period is by no means clear for a number of reasons. In *R v. Secretary of State for Trade and Industry ex parte Unison, GMB and NASUWT* [1996] IRLR 435, the challenge to the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, the Divisional Court held that a two year qualifying period for unfair dismissal complaints did not have an adverse impact on women. The Regulations reversed *Milligan v. Securicor Cleaning Ltd* [1995] IRLR 288 which held that the two year qualifying period did not apply to transfer-related dismissals. Using up-dated figures covering the period up to Autumn 1994, the Div. Ct found that 25.7% of men had less than two years' service compared with 30.2% of women. The ratio of the percentage of women to men with two years service or more was 94.2%. On this basis it held that women suffered no disparate adverse impact. Finally, recent decisions of the ECJ seem to indicate that the Court is moving towards imposing less stringent justification standards on Member States than it seemed to in earlier decisions such as *Rinner-Kühn* which the Court of Appeal applied in its decision; see *Case C-317/93 Nolte v. Landesversicherungsanstalt Hannover* [1995] I-ECR 4625 and *Case C-444/93 Megner and Scheffcl v. Innungskrankenkasse Vorderpfalz* [1995] I-ECR 4741. These cases, which involved 'minor

changes which have improved the employment law fate of many female employees.

But what of the fate of employees who, in the past, had been prevented from exercising their Community law rights? Taken in combination with each other and two decisions of the ECJ in 1994 (*Vroege, Fisscher*)<sup>155</sup> which stated that the exclusion of women from access to occupational pension schemes contravened Art.119 and was not subject to the temporal limitation in *Barber*,<sup>156</sup> however, the decisions were potentially dynamite. *Vroege, Fisscher* and *ex parte EOC* opened the door to claims stretching back as far as 8 April 1976 (the date of *Defrenne No.2*)<sup>157</sup> for part-time women excluded from occupational pension schemes or women illegally excluded from redundancy pay. The MoD's admission of liability exposed it to liability from 9 August 1978 (the deadline for implementation of the ETD) for dismissal of service-women on grounds of pregnancy. If the exclusion from unfair dismissal rights breached only the ETD, public sector employers were potentially exposed to liability from 1978 (and 1985 in the case of the two year qualifying period). If this exclusion also breached Art.119, both public and private sector employers were potentially exposed to liability from 8 April 1976 (so far as the thresholds were concerned) and 1985 (so far as the two year qualifying period was concerned).

Added to this was the fact that following *Marshall No.2* there was no limit on the amount of compensation tribunals could award in what promised to be a vast number of claims.<sup>158</sup>

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workers' asserted that objective justification had been established rather than applying any test of justification. Though they concern Directive 79/7, where the Court has often been more lax in deciding issues of objective justification, the intimate connection of the facts in these cases and those raised under Art.119 has led to fears that the Court is retreating on the stricter test of *Rinner-Kühn*.

<sup>155</sup> Case C-57/93 *Vroege v. NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds* [1994] ECR I-4541; Case C-128/93 *Fisscher v. Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor Detailhandel* [1994] ECR I-4583. See also Case C-435/93 *Dietz v. Stichting Thuiszorg Rotterdam* [1996] IRLR 692 (ECJ): the temporal limitation in *Barber* applies neither to access to pension schemes nor to the right to payment of a retirement pension where the worker was excluded from the scheme in breach of Art.119.

<sup>156</sup> Case C-262/88 *Barber v. Guardian Royal Exchange* [1990] ECR I-1889. See the Occupational Pension Schemes (Equal Access to Membership) Amendment Regulations 1995 (SI 1995/1215).

<sup>157</sup> Case 43/75 *Defrenne v. Sabena (No.2)* [1976] ECR 455. In this case, the ECJ held that Art.119 was both horizontally and vertically directly effective but limited the application of the judgment to the date on which judgment was given: 8 April 1976.

<sup>158</sup> See also *Harvey v. Institute of the Motor Industry (No.2)* [1995] IRLR 416 where the EAT allowed an appeal against an IT decision applying the upper limit on compensation as the discriminatory act was done before the 1993 Regulations came into force. The EAT stated that the courts should be slow to construe a legislative provision in a



Finally, *Marshall No.2* stated that 'real equality of opportunity' requires the loss and damage actually sustained as a result of discrimination to be made good in full. This immediately cast suspicion on two further provisions in UK legislation restricting compensation. The first was s.66(3) SDA which excluded compensation for indirect discrimination unless the discriminator intended to discriminate. This meant in practice that indirect discrimination compensation had never been awarded. The second was s.2(5) EqPA which limits backpay for failure to respect the principle of equal pay to two years prior to the institution of proceedings.

In this context, it becomes essential to examine closely ECJ jurisprudence on Community law requirements regarding the enforcement of Community law rights in national courts. While this ground is continually shifting, the following points can be made. In general, procedural rules governing the enforcement of Community law rights in national courts by individuals are a matter for the Member States. This general rule is, however, subject to a number of provisos and further refinements:

- procedural rules governing the exercise of Community law rights must not be less favourable than those relating to similar national claims: the 'comparability' or 'non-discrimination' requirement.
- procedural rules must not make exercise of the Community law right 'impossible or excessively difficult'.<sup>159</sup>
- where a Member State has failed to correctly implement its obligations under a directive, it cannot rely on national time-limits to bar a claim until the lack of conformity with the directive's obligations has been cured (the *Emmott* principle).<sup>160</sup>
- *Emmott* does not apply to national procedural rules which do not deprive individuals of the right to bring a claim but place limits on the retroactive effects of Community law

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way which perpetuates a breach of European law for longer than is necessary. It could be assumed that the legislature would wish the difference between the rights of public and private sector employees to continue for as short a time as possible and would wish to protect itself from possible *Francovich* claims. The effects of *Marshall No.2* were also considered in *Orlando v. Didcot Power Station Sports and Social Club* [1996] IRLR 262 where the EAT rejected the argument that the ECJ's judgment and the removal of the statutory cap necessitated an increase in awards for injury to feelings.

<sup>159</sup> Case 33/76 *Rewe* [1976] ECR 1989; Case 199/82 *San Giorgio* [1983] ECR 3595.

<sup>160</sup> Whether this 'principle' still exists, or constituted an extraordinary solution for an extraordinary set of facts, is in grave doubt following the ECJ decision in Case C-62/93 *BP Supergas v. Greece* [1995] ECR I-1883. See further Coppel, 'Time up for *Emmott*?', 25 *ILJ* (1996) 153.

claims ('arrears limits').<sup>161</sup> This limitation on *Emmott* however, appears to sit very uneasily with the principle of *Marshall No.2* that full compensation must be awarded for losses caused to a claimant by sex discrimination.<sup>162</sup> The relationship between the 'arrears limits' decisions and *Marshall No.2* has not yet been explored by the ECJ.

A final possibility for an aggrieved claimant seeking redress for failure to allow enjoyment of a Community law right is a *Francovich*<sup>163</sup> claim against the State. This is a *sui generis* Community law remedy, applicable across the Member States' legal systems but subject to national procedural rules. In *Francovich* the ECJ laid down three conditions which would need to be present before a damages claim could be brought against a State: (i) the Community rule must give rights to private parties; (ii) the content of these rights must be identifiable from the Community rule; (iii) there must be a causal link between the state's breach and the plaintiff's loss. Subsequent cases have clarified the crucial issue of the standard of liability. It would appear that States are not subject to a strict liability test for every breach of Community law. Rather, the breach must be 'sufficiently serious'. A number of factors will be taken into account to decide if such a breach has occurred including the degree of national discretion and whether the breach was intentional or involuntary. On the basis of the case-law to date,<sup>164</sup> Member States seem most likely to escape liability where they acted on a plausible meaning of a directive which had not been subject to any contrary opinion or clarification from either the Commission or the ECJ. By contrast, Member States which fail to implement a directive will always commit a 'sufficiently serious' breach.<sup>165</sup>

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<sup>161</sup> Case C-338/91 *Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475; Case C-410/92 *Johnson v. Chief Adjudication Officer (No.2)* [1994] ECR I-5483.

<sup>162</sup> *Supra* at Section 2.3.5.3.

<sup>163</sup> Cases C-6/90 and C-9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.

<sup>164</sup> Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Germany; R v. Secretary of State for Transport ex parte Factortame*, 1 CMLR [1996] 889; Case C-392/93 *R v. HM Treasury ex parte British Telecommunications plc*, 2 CMLR [1996] 217; Case C-5/94 *R v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd.*, 2 CMLR [1996] 391; Joined Cases C-178/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer et al v. Federal Republic of Germany* [1997] IRLR 60 (ECJ).

<sup>165</sup> It has been decided that ITs have no inherent jurisdiction to hear *Francovich* claims. According to *Secretary of State for Employment v. Mann* [1996] IRLR 4, such actions should be heard before the High Court with the Attorney-General named as defendant. This case involves a *Francovich* claim for defective implementation of the Insolvency Directive.

#### 2.3.5.6 *The fallout Part 1: S.66(3) SDA*

One longstanding major defect in the compensation provisions of the SDA has been removed relatively painlessly. This was the denial under s.66(3) of compensation in cases of indirect discrimination which are not intentional. Following *Marshall No.2*, a number of courts began to question in various ways whether this restriction respected either the letter or the spirit of Community law. In *Macmillan*<sup>166</sup> the IT stated that, in the light of *Marshall No.2*, s.66(3) SDA contravened the ETD, but that as the plaintiff was a private employee she could not rely on the direct effect of Art.6 and 'indirect effect' could not be applied here as the SDA could not be construed in accordance with the Directive without distorting the meaning of the domestic legislation. The EAT accepted that it was impossible to interpret s.66(3) to make it accord with the Directive. In *London Underground v. Edwards*,<sup>167</sup> the EAT agreed with the IT's decision to award compensation under s.66(3) on the grounds that by giving 'intention' a particular meaning on the facts of this case, an intention to apply the indirectly discriminatory requirement could be inferred. In 1996, this restriction on indirect discrimination compensation was removed from the SDA.<sup>168</sup>

#### 2.3.5.7 *The fallout Part 2: The MoD cases*

As the MoD had admitted liability and was clearly part of the State, issues relating to time limits under Community law could not arise. However, the MoD cases raise two interesting issues. The first was how the national courts would respond to the requirements of *Marshall No.2* in cases involving a substantial quantum of damages. The second was whether exemplary damages could be awarded in a Community law claim.

The MoD contested the amount of compensation awarded by ITs to seven selected dismissed

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<sup>166</sup> *Macmillan v. Edinburgh Voluntary Organisations Council* [1995] IRLR 536.

<sup>167</sup> For further discussion of this case see *supra* text accompanying n.119.

<sup>168</sup> See The Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996 (SI 438/1996). The relevant provisions came into force on March 25 1996.

servicewomen in *MoD v. Cannock*.<sup>169</sup> In this case, the EAT gave guidance to ITs and illustrated a certain reluctance to accept the import of *Marshall No.2*. Thus, the EAT stated that the ITs, when assessing compensation:

should keep a sense of due proportion...In the present cases, some of the large awards were wholly unjustified, manifestly excessive, wrong in principle and out of proportion to the wrong done.

*Cannock* is also full of dubious assumptions about the ease with which women can re-enter the employment market following dismissal from the armed services, pregnancy and a new-born child. These assumptions are used to encourage the reduction of compensation on the grounds that the women concerned have failed to mitigate their loss. Thus the EAT stated:

the hypothesis on which she would recover anything at all for loss of earnings is that she would have been ready, willing and able to resume her onerous duties six months after the child was born.

Post *Cannock*, the levels of compensation paid out by ITs to dismissed servicewomen were halved. The issue was considered again in *MoD v. Hunt*<sup>170</sup> which concerned six cases decided by ITs following the *Cannock* decision. In four cases, the MoD challenged the amount of compensation awarded and in two cases, dismissed servicewomen challenged their awards. In its decision, the EAT moved the point of departure in deciding compensation firmly away from *Cannock* and back to *Marshall No.2*. It stated that if *Cannock* advocated an approach which required reconsideration of the figure produced by aggregating the constituent heads of damage, it would not be agreed with as this would be to introduce a judicial cap in an area where there is no statutory cap and would be contrary to *Marshall No.2*. In accordance with this position, it readjusted some of the dubious assumptions about the dismissed servicewomen made in *Cannock*. Thus, it held that ITs were entitled to take into account, in deciding that women had not failed to mitigate, factors such as the 'disadvantage of having a baby to care for'. In so doing, ITs were acknowledging that, at the time in question, it was common for employers to make gender-based assumptions and that there was a disadvantage in being a woman with a young child. ITs were also entitled to find that there was a 100% chance that a woman would have returned to work,

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<sup>169</sup> [1994] IRLR 509.

<sup>170</sup> [1996] IRLR 139.

notwithstanding the fact that there were inconsistencies in her employment pattern in the period after her discharge.<sup>171</sup>

The second issue concerning the award of exemplary damages in Community law claims was considered in *MoD v. Meredith*.<sup>172</sup> Ms Meredith sought discovery of information which might show whether, and if so when, the MoD knew that its policy of dismissing pregnant women contravened the ETD. Exemplary damages are a special head of damages in English law, intended to punish the wrongdoer, rather than merely compensate the victim. In 1964 the House of Lords in *Rookes v. Barnard* set out a series of principles for cases in which exemplary damages should be awarded.<sup>173</sup> In 1993, the Court of Appeal stated that the House of Lords in 1964 had intended to restrict exemplary damages to torts existing at the date of the judgment.<sup>174</sup> This has been interpreted in *Deane v. Ealing Borough Council* to mean that exemplary damages can not be awarded in cases involving statutory torts, such as race and sex discrimination, created after 1964.<sup>175</sup> In *Meredith*, the EAT decided that discovery should not be granted as exemplary damages were not available for breaches of the ETD. This was justified on two grounds. First, the criterion of 'sufficient enforceability' laid down in *Von Colson*<sup>176</sup> did not require compensation to include a punitive element over and above adequate compensation for the damage sustained. Secondly, the Community law criterion of 'comparability' did not require the availability of exemplary damages. If the tort of breaching the ETD were comparable with anything, it was comparable with the statutory tort of sex discrimination. As exemplary damages are not available for breach of the SDA, they should not be available for breach of the ETD. This decision is important for two reasons. First, it shows that the criteria of 'sufficient enforceability' and

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<sup>171</sup> In 1994-95, half of the five million pounds paid out to victims of unlawful sex discrimination went to ex-service personnel discharged because of pregnancy. Only a small proportion of the 5,000 or so payments made by the MoD to dismissed servicewomen comprise IT awards. The vast majority have been settlements. Compensation of around £55,000,000 has been paid out to about 5,000 ex-servicewomen. This information is taken from and further details are available in 67 *EOR* (1996) 23.

<sup>172</sup> [1995] IRLR 539.

<sup>173</sup> [1964] AC 1129; see also *Cassell v. Broome* [1972] AC 1027.

<sup>174</sup> *AB v. South West Water Services Ltd.* [1993] 1 All ER 609.

<sup>175</sup> [1993] IRLR 209.

<sup>176</sup> Case 14/83 *von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891.

'comparability' have not been sufficiently fleshed out by the ECJ, leaving room for restrictive interpretations by national courts. Secondly, while this case did not discuss *Francovich* liability, the issues of discovery and exemplary damages are crucial to the potential liability of the State for breaches of Community law.

#### 2.3.5.8 *The fallout Part 3: Time limits and arrears limits - a new approach*

The new approach to time limits was not adopted in the first case decided following the 'big target' cases. In *Methilhill*<sup>177</sup> a part-time worker whose unfair dismissal claim had been dismissed in February 1994 on the grounds that she did not fulfil EP(C)A requirements lodged a fresh claim post *ex parte* EOC in May 1994. The EAT upheld the IT's decision to hold that the application was not out of time. It held that the claim was not *res judicata* as this was an entirely new claim under Art. 119. Nor was it barred by issue estoppel as there was no challenge to the facts found by the IT. Applying *Rankin*,<sup>178</sup> the EAT held that the Art. 119 claim had been presented within a reasonable time of the House of Lords decision in *ex parte* EOC.

This can be seen as the last in the old line of cases where the letter and the spirit of *Emmott* was applied to prevent time limits running against applicants who were unaware that Community law rights existed until a decision stating this had been made by a court of authority. It stands in stark contrast to *Setiya*, the next case to be considered.<sup>179</sup> Here, the EAT refused to allow a doctor employed for less than eight hours per week an extension of time to appeal, in the light of *ex parte* EOC, against a 1992 IT decision that he could not bring an unfair dismissal complaint. The EAT justified this decision on the grounds that the *Emmott* principle did not apply to national time limits for appealing against a decision. It applied only to time limits for initiating proceedings. Nor would it be appropriate to use judicial discretion to hear the late appeal as it was open to Dr. Setiya's legal advisors in 1992 to take the legal points which ultimately succeeded before the House of Lords.

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<sup>177</sup> *Methilhill Bowling Club v. Hunter* [1995] IRLR 232.

<sup>178</sup> *Supra* at n.139.

<sup>179</sup> [1995] IRLR 348.

These types of arguments were consolidated and extended in *Biggs*.<sup>180</sup> Ms Biggs was dismissed shortly after *Defrenne No.2* in August 1976. She had not previously brought an unfair dismissal complaint because of the state of the law at that time. She brought a claim in June 1994, within three months of *ex parte EOC*. The Court of Appeal held that Ms Biggs had no right to have her claim considered. It gave two main reasons for its decision:

- it was 'reasonably practicable' within the meaning of s.67(2) EP(C)A for Ms Biggs to have presented her claim within three months following her dismissal in 1976. The fact that the House of Lords did not decide *ex parte EOC* until 1994 could not be taken into account as a ground for arguing that it was not 'reasonably practicable' for Ms Biggs to have exercised her right.
- UK courts were not bound by Community law to disapply the time limits imposed by s.67(2) on the grounds that their application made it impossible in practice or extremely difficult to enforce a Community law right. This was because the *Emmott* principle applied only to directives and not to claims under Art.119. Treaty articles are directly enforceable in the UK and require no national implementation. This meant that UK time limits could be relied upon even before UK legislation had been brought into line with Community requirements in the 1995 Regulations.

Court of Appeal authority was also given to the *Setiya* reasoning in *Barber v. Staffordshire County Council*<sup>181</sup> which held that a part-time worker was estopped from claiming a redundancy payment and unfair dismissal compensation following *ex parte EOC* since she had made a previous IT claim which she had subsequently withdrawn. Art.119 did not create a freestanding right to redundancy payments or unfair dismissal compensation. It could merely be relied upon to disapply barriers to a claim which are incompatible with Community law.

The latest case to receive this judicial treatment was *Preston*.<sup>182</sup> This case is the national follow-up

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<sup>180</sup> *Biggs v. Somerset County Council* [1996] IRLR 203 (CA).

<sup>181</sup> [1996] IRLR 209.

<sup>182</sup> *Preston and others v. (1) Wolverhampton Healthcare NHS Trust (2) Secretary of State for Health; Fletcher and others v. Midland Bank plc* [1996] IRLR 484. The Court of Appeal [1997] IRLR 233 has rejected an appeal against the EAT decision, accepting the reasoning of the EAT and has refused to make a reference to the ECJ on the ground that the matter is *acte clair*; see also 72 *EOR* (1997) 42ff.

by part-timers excluded from occupational pension schemes to enforce the Community law rights enunciated in *Vroege and Fisscher*.<sup>183</sup> The case involved 40,000 applications made by part-time employees to ITs. The IT chair appointed to consider preliminary points in these claims decided that the time limits in s.2(4) EqPA applied to the claims. This meant that the claims were out of time unless they had been brought during the employee's employment or within six months of its termination. He further decided that successful applicants would be entitled to no more than two years backdated membership of the applicable pension scheme, in application of s.2(5) EqPA. Both the time limits (s.2(4)) and the arrears limit (s.2(5)) points were appealed to the EAT.

On the six month time limit, the EAT followed the Court of Appeal in *Biggs*<sup>184</sup> and *Barber*<sup>185</sup> to decide that s.2(4) applied to claims based on Art.119. The *Emmott* principle did not apply to Art.119 claims. The EAT held that the six month time limit did not discriminate between Community law rights and national rights as Art.119 claims should be compared with claims under the EqPA. Moreover, there was no support in UK or Community law for a wide-ranging comparison of time limits for other domestic causes of action relating to discrimination in employment or to employment contracts generally. Such claims were not similar claims. Nor was it 'excessively difficult' to exercise the Community law right. Art.119 has provided directly enforceable rights since 1976. Inconsistent provisions of domestic law did not establish a bar to the enforcement of Community law rights. The applicants' knowledge of their legal rights and their understanding or lack of understanding of them was not relevant to the question of whether it is impossible in practice for them to exercise the rights in Community law.

On the arrears limit, the EAT held that it was compatible with Community law as it was reasonable, did not discriminate between national and Community law rights and did not mean that no effective remedy was available for breach of Community law. Furthermore, as the limit was on backdating and not on quantum, it did not offend against the principles set down in

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<sup>183</sup> *Supra* at n.155.

<sup>184</sup> *Supra* at n.180.

<sup>185</sup> *Supra* at n.181.



*Marshall No.2*.<sup>186</sup> The ECJ decisions in *Johnson No.2* and *Steenhorst-Neerings* supported the EAT's conclusions.<sup>187</sup> The EAT concluded this *tour de force* by stating that no reference to the ECJ on either of these issues was necessary as there was no real doubt about the correct interpretation of the relevant provisions of Community law.

These cases illustrate both the determination of the British judiciary to limit back claims resulting from the 'big target' cases and their willingness to resort to extremely dubious reasoning in order to reach this result. These cases give meanings to the two criteria the ECJ has laid down for Community law claims - 'not less favourable than similar national law claims' and not 'excessively difficult' to exercise - which suffer from selective blindness, tautological reasoning and sheer lunacy. In *Biggs* the holding that it was 'reasonably practicable' to assert an unfair dismissal right when it is technically possible to do so conveniently ignores a long line of authority which states that 'mistakes of law' in unfair dismissal claims can make it not 'reasonably practicable' to comply with a time limit. As Rubenstein points out, the conclusion that there is no discrimination between national and Community claims in *Preston* 'entails not so much a comparison of procedural conditions as a definition which makes a comparison impossible'.<sup>188</sup> The goal posts of comparison in these cases shift in order to limit retrospective claims as much as possible in the case under examination. Finally, one must ask, if the difficulties which faced Ms Biggs in 1976, Dr Setiya in 1992 and the other claimants did not make Community law rights 'excessively difficult' to claim, in what conceivable situation could the criterion of 'excessive difficulty' ever be applied?

This desperate judicial attempt to close down all possible avenues of redress to part-time workers unlawfully excluded from domestic employment rights over the last two decades did not convince the lay members of the EAT in *Levez*.<sup>189</sup> They decided to refer a number of questions to the ECJ

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<sup>186</sup> *Supra* at n.141 and Section 2.3.5.5.

<sup>187</sup> *Supra* at n.161.

<sup>188</sup> 'Highlights', [1996] IRLR 481.

<sup>189</sup> *Levez v. T H Jennings (Harlow Pools) Ltd* [1996] IRLR 499. The judicial member of the EAT gave a dissenting judgment on the grounds that there was no need to refer to the European Court as the ECJ has consistently held that reasonable limitations on retroactive effect are not incompatible with Community law. A reference has also been made on the exclusion of part-timers from additional pension benefits by a Belfast IT in Case C-246/96 *Magorrian v. Eastern Health and Social Services Board*. The IT has asked whether the additional benefits to which the part-timers are entitled should be calculated from the date of *Barber* (17 May 1990) or the date of *Defrenne No.2* (8 April 1976)

on the compatibility of the arrears limits in s.2(5) EqPA with Art.119 and the EPD. In so doing, they are reopening two of the doors which the British judiciary, faced with backclaims, have tried to close. The first is that of comparability. Which national claims can be compared with Community law claims in order to determine if the Community law right is being less favourably treated? The EAT lay members rejected the circular reasoning in *Preston* and asked the ECJ whether the appropriate comparison is with other employment law claims. The second is that of the compatibility of 'arrears limits' with Art.2 EPD, the sister of Art.6 ETD, and the 'effective remedies' required under that provision by *Marshall No.2*. Given the unprincipled and unpredictable nature of ECJ jurisprudence in this area to date, we can merely hope that the ECJ does not adopt the same Pontius Pilate attitude as the House of Lords, which refused leave to appeal in *Biggs*, and instead face up to the consequences of the practical implications of its decisions.

### 3. The ECJ and the ETD

As stated at the beginning of this chapter, discussion of the ECJ's jurisprudential activity will focus on the ETD, as this permits sharpened comparisons of the influence of Community law on the national systems. The most striking and obvious conclusion to be drawn is the relative *unimportance* of the ETD in the construction of the positive aspects of the ECJ's case-law edifice. What is meant by this statement?

First, *quantitatively*, the ECJ has made fewer rulings on the ETD than on Art.119 (and the EPD) and Directive 79/7.<sup>190</sup> It is also arguable that four of the decisions based on the ETD, would, in the light of further case law development, have, if they were decided now, been decided on the basis of Article 119.<sup>191</sup> Furthermore, a higher proportion of these rulings have resulted from

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and whether the restriction of back pay to a maximum period of two years amounts to the denial of an effective remedy under Community law.

<sup>190</sup> Around 100 rulings have been made by the ECJ on these three Directives. Of these, about 40 are decided as equal pay issues, around 35 under Directive 79/7 and just over 25 are decided under the ETD.

<sup>191</sup> The cases are *Burton*, *Roberts*, *Marshall* all *supra* at n.71 and Case 262/84 *Beets-Proper v. Van Lanschot Bankiers NV* [1986] ECR 773. It is arguable in the light of cases such as *Bilka supra* at n.45 and *Barber supra* at n.156 that these cases would (or at least could) have been decided on the basis of Art.119.

Art.169 proceedings than is the case for the other two directives.<sup>192</sup>

Second, *qualitatively*, preliminary reference decisions on the ETD must be seen as the poor cousin of decisions made using Art.119 and the EPD. The positive contribution of the Court's case-law on the ETD has been confined to three discrete areas: staking out pregnancy discrimination as direct discrimination;<sup>193</sup> developing effective judicial protection<sup>194</sup> and, most recently, the acceptance that the equal treatment principle applies to transsexuals.<sup>195</sup>

Outside these admittedly very important areas, the Court's interpretations of the ETD in preliminary reference proceedings have generally<sup>196</sup> amounted to, at best unsatisfactory, and at worst, highly questionable interpretations of when the equal treatment principle will (or will not) apply. These decisions have been characterised by a lack of audacity and a narrow reading of the equal treatment principle reflected in an unwillingness to challenge current patterns of family and work organisation.<sup>197</sup> This can be seen in the nightwork decisions,<sup>198</sup> the Court's interpretation

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<sup>192</sup> To date, six decisions have been given by the ECJ as a result of infringement proceedings based on the ETD (three involving France and one each against the UK, Italy and Germany), four on the equal pay provisions (against the UK, Luxembourg, Denmark and Belgium) and one on the social security directive (against Belgium). The three ETD judgments against France are Case 318/86, [1988] ECR 3559, Case 312/86, [1988] ECR 6315, Case C-197/96, judgment of 13 March 1997. The other three ETD judgments are Case 165/82 *Commission v. UK* [1983] ECR 3431, Case 163/82 *Commission v. Italy* [1983] ECR 3273 and Case 248/83 *Commission v. Germany* [1985] ECR 1459. The four equal pay judgments are Case 61/81 *Commission v. UK* [1982] ECR 2601, Case 58/81 *Commission v. Luxembourg* [1982] ECR 2175, Case 143/83 *Commission v. Denmark* [1985] ECR 427 and Case C-173/91 *Commission v. Belgium* [1993] ECR I-673. The social security case is Case C-229/89 *Commission v. Belgium* [1991] ECR I-2205.

<sup>193</sup> See the discussion in Chapter 5 at Section 3.3.3.

<sup>194</sup> See *von Colson supra* at n.176, Case 79/83 *Harz v. Deutsche Tradax* [1984] ECR 1921, *Johnston supra* at n.69 and *Marshall(No.2) supra* at n.141. Arguably, *Foster supra* at n.134 should also be included here although it constitutes merely part of a general attempt to mitigate the consequences of directives lacking horizontal direct effect.

<sup>195</sup> *P v. S supra* at n.100.

<sup>196</sup> An arguable exception is its decision in Case 116/94 *Meyers v. Adjudication Officer* [1995] ECR I-2131. Here, the Court opened the door to an argument that failure to deduct childcare costs in calculating income for the purposes of awarding a supplement to the income of low paid workers with children (Family Credit) may constitute indirect discrimination contrary to the ETD. This is merely arguable because the narrowness of the question referred meant that the Court only decided that such a benefit fell within the scope of the ETD.

<sup>197</sup> The questionable assumption in *Johnston supra* at n.69 is the finding that Art.2(2) ETD can cover the exclusion of a job-holder from an employment activity impacting on her. Genuine occupational qualifications are generally concerned with the impact of 'sex' on persons other than the job-holder.

<sup>198</sup> The night work decisions are discussed in detail in Chapter 6.

of Art.2(3) ETD<sup>199</sup> and its interpretation of Art.2(4) ETD in *Kalanke*.<sup>200</sup>

The ECJ may in part have encouraged<sup>201</sup> this drift towards greater use of Art.119 and its companion, the EPD, in order to avoid the problems of horizontal direct effect which arise in the case of the ETD. Whatever the explanations may be for the ETD's poor cousin status,<sup>202</sup> the outcome is startling in relation to one of the ECJ's key achievements: the incremental construction of the concept of indirect (and following *Enderby*, a new species of 'apparent') discrimination.<sup>203</sup> Despite the fact that the term indirect discrimination appears only in the equal treatment directives and not in supranational equal pay legislation, the ECJ has developed its boldest pronouncements on the content of this concept on the basis of cases decided under Article 119 and the EPD. Unlike the other main issue litigated under Art.119, equality in occupational pensions,<sup>204</sup> its case law on indirect discrimination and Article 119 has stood out as a shining example of how Community law can provide interpretations of discrimination which help women improve their

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<sup>199</sup> For discussion see Chapter 5 at Section 5.3.1.

<sup>200</sup> Case C-450/93 *Eckhard Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051 is discussed in Chapter 4 at Section 5.1.3.

<sup>201</sup> See, for example, consideration of the UK government's arguments in *Bilka supra* at n.45 by the ECJ. The UK argued that Case 149/77 *Defrenne v. Sabena (No.3)* [1978] ECR 1365 and *Burton supra* at n.71 made it clear that conditions of access to occupational pension schemes fall under the ETD and not the EPD. The ECJ held, without trying to distinguish or explain the two decisions cited by the UK, that the contractual nature of the scheme meant that it fell within the scope of Art.119.

<sup>202</sup> That this poverty is only relative is of course well illustrated by the position of the ETD in relation to the occupational social security directive which has been virtually demolished by the sweeping effects of Art.119. For an excellent account of this demolition job see Curtin, 'Scalping the Community legislator: Occupational pensions and *Barber*', 27 *CMLRev* (1990) 475.

<sup>203</sup> For the construction of this indirect discrimination edifice see the cases cited *supra* at n.147 and the discussion of *Enderby supra* at n.103 and accompanying text.

<sup>204</sup> The pensions issue has been sullied by *inter alia* (i) the fact that much of the case-law is geared to helping male litigants access the earlier pension ages of women, (ii) the very explicit deference to employer and pension fund cost considerations as evidenced by the temporal limitation in *Barber supra* at n.156 and its subsequent clarification in Case C-109/91 *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf* [1993] ECR I-4879 and the acceptance that discriminatory actuarial calculations fall outside the scope of Art.119 (Case C-152/91 *Neath v. Hugh Steeper Ltd* [1994] ECR I-6935, Case C-200/91 *Coloroll Pension Trustees Ltd v. Russell* [1994] ECR I-4389), (iii) the acceptance that levelling-down to achieve equality was acceptable (Case C-408/92 *Smith v. Avdel Systems Ltd* [1994] ECR I-4435) and that, moreover, transitional measures to cushion women from the effects of this levelling-down contravened the equal pay principle (Case C-28/93 *Van der Akker v. Stichting Shell Pensioenfonds* [1994] ECR I-4527, *Commission v. Belgium supra* at n.192) (iv) the decision that women excluded from occupational pension schemes have to pay all the past contributions owed in order to obtain benefits from the scheme (*Smith v. Avdel*).

employment position.<sup>205</sup> At ECJ level, the only contribution of the ETD to the development of indirect discrimination has been a wholly undistinguished one. In *Kirshammer-Hack*,<sup>206</sup> the ECJ was asked two questions on the compatibility of German unfair dismissal law with Community law. The German law stated that it did not apply to businesses employing five or less employees. In determining the number of employees, no account was to be taken of people whose working hours do not normally exceed ten hours per week or 45 hours per month. The ECJ was asked whether the exclusion of small businesses constituted a state aid and whether the hours requirement constituted indirect discrimination in breach of Arts.2 and 5 ETD. The Court answered both questions in the negative. On the ETD indirect discrimination point,<sup>207</sup> the Court stated that it had not been established that women were disproportionately affected, as it had not been shown that small businesses employed a considerably greater number of women than men. More interestingly, it went on to hold that, even if such disproportionate impact had been established, in so far as the exemption was intended to alleviate the constraints on small businesses, it could be justified by objective reasons unrelated to the sex of the employees. In a strange extension of the proviso in Art. 118a (which states that health and safety measures adopted under that provision shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized enterprises) to all social policy measures, the Court justified special economic measures for small firms. We can only be grateful that the dubious reasoning in this case has not been extended. How uneasily it sits with current interpretations of Art. 119 indirect discrimination can be seen if we imagine that this line of reasoning could lead to the ECJ saying that Art. 118a justifies paying part-time employees less if they work in small or medium-sized enterprises. This decision also sits uneasily with the ECJ's pronouncements that sex equality is a fundamental principle of Community law.<sup>208</sup>

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<sup>205</sup> Thus far, the Art.119 indirect discrimination decisions have remained 'insulated' from the more restrictive interpretations of indirect discrimination under Directive 79/7. It remains to be seen whether the deference to Member State discretion shown in two recent decisions under 79/7, *Nolte* and *Megner supra* at n.154 marks the beginning of a retreat in the Art.119 context from the stricter test of *Rinner-Kühn supra* at n.145.

<sup>206</sup> Case C-189/91 *Kirshammer-Hack v. Sidal* [1993] ECR I-6185.

<sup>207</sup> For an excellent analysis of the 'state aid' issue see Davies, 'Market integration and Social Policy in the Court of Justice', 24 *ILJ* (1995) 379.

<sup>208</sup> *Defrenne III supra* at n.201; see also Docksey, 'The Principle of Equality Between Men and Women as a Fundamental Right Under Community law', 20 *ILJ* (1991) 258.

The Court's record in infringement proceedings provides little relief from this rather gloomy portrayal of the ETD. The Commission was unsuccessful in arguing that adoptive fathers and mothers should have the same rights to leave,<sup>209</sup> that excluding men from the occupation of midwifery constitutes a breach of the ETD,<sup>210</sup> that Art.2(2) requires Member States to maintain a finite list of exceptions where the discrimination prohibition does not apply, that the ETD requires Member States to enact legislation outlawing discrimination in relation to offers of employment and that German constitutional provisions did not guarantee sufficient protection against sex discrimination for public sector employees or the self-employed.<sup>211</sup>

The Court found in favour of the Commission on a number of issues. A clause preserving female-specific clauses in collective agreements did not fall within either Art.2(3) or Art.2(4) and therefore breached the ETD.<sup>212</sup> Art.2(2) permits exceptions to the discrimination rule only in relation to certain specific activities and the exceptions must be sufficiently transparent to allow supervision by the Commission.<sup>213</sup> The ETD applies to non-binding as well as binding collective agreements. Art.2(2) does not permit a blanket exclusion of employees in private households and in small undertakings with less than five employees from the scope of the anti-discrimination rule.<sup>214</sup>

#### 4. The French case law landscape

Before surveying the case law landscape, a number of substantial reservations and clarifications have to be made. French discrimination cases are extremely difficult to find. In my search, I have concentrated on *Cour de Cassation* decisions as these are the subject of official case reporting in the *Bulletin Civil des Arrêts de la Cour de Cassation* (Bulletin Civil). However, if this search had

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<sup>209</sup> *Commission v. Italy supra* at n.192.

<sup>210</sup> *Commission v. UK [1983] supra* at n.192.

<sup>211</sup> *Commission v. Germany supra* at n.192.

<sup>212</sup> *Case 312/86, Commission v. France supra* at n.192.

<sup>213</sup> *Case 318/86 Commission v. France supra* at n.192.

<sup>214</sup> *Commission v. UK [1983] supra* at n.192.

been limited to cases published in the *Bulletin Civil*, dealing with national and supranational sex equality sources, the search from the introduction of the 1983 law would have produced eight cases, half of these published in the last two years. To find out whether the selective reporting of *Cour de Cassation* cases results in the masking of discrimination litigation, and whether other courts are making decisions on sex discrimination provisions, the search was broadened to encompass unreported *Cour de Cassation* decisions (recovered through searches on a LEXIS database); lower court decisions reported sporadically in other reviews;<sup>215</sup> and *Conseil d'Etat* decisions.<sup>216</sup> Expanding the field in this manner brings the case total in the civil courts to 52.<sup>217</sup> For the *Conseil d'Etat*, four cases were found for the period following the condemnation of the French system in 1988 by the ECJ.<sup>218</sup> Despite the very recent awakening of interest in sex equality litigation in France, it remains the case that no comprehensive (or even partial) exposition of French sex equality litigation since the passage of the *Loi Roudy* exists.<sup>219</sup> This section aims to begin to fill that gap.

To explain this case-law landscape most effectively, the 52 cases are subdivided according to the legislative provisions applied in the cases. Thus, cases argued and decided under purely national provisions (thirteen cases) are examined first, followed by cases which used a mixture of national and supranational sources (sixteen cases) and cases which considered solely supranational equality sources (23 cases). Cases decided by the *Conseil d'Etat* conclude this survey of French sex equality litigation (four cases).

#### 4.1 Cases utilising national sources

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<sup>215</sup> Principally *Droit Ouvrier*, *Droit du Travail*, *Droit Social* and the *EC Equality Expert Network Newsletter*.

<sup>216</sup> Found in either the official reports *Recueil Lebon*, LEXIS database searches and the *EC Equality Expert Network Newsletter*.

<sup>217</sup> Excluding the night work cases which are discussed separately in Chapter 6.

<sup>218</sup> See Chapter 1 at Section 2.1.4. I have excluded from discussion *Cass. Soc.* 7 December 1993, *Compagnie nationale Air France v. Mme Rabussier*, *Droit Ouvrier* (1994) 325 as this case concerns merely a jurisdictional point about the scope of a decision by the *Conseil d'Etat* in *Baudet v. Air France*, 6 February 1981, *Recueil Lebon*, 53, that requiring female cabin staff to retire at the age of 50 while male cabin staff could work until the age of 55 contravened the principle of French administrative law of equality between the sexes. For an excellent discussion of the *Conseil d'Etat*'s decision in *Baudet* see Neville-Brown, 'Air Hostesses and Employers', 47 *Modern Law Review* (1984) 692.

<sup>219</sup> Chapter 1 at n.23.

Of the thirteen cases decided under purely national provisions, some are of little interest because the sex equality provision is cited in argument rather than utilised by the court in coming to its decision.<sup>220</sup> No employee has ever successfully invoked Art.L.123 Labour Code before the *Cour de Cassation*.

Three decisions are of interest, though the first two involve the Criminal Chamber making two decisions on the same case. In 1984, Mme Aghabian, in anticipation of her marriage, asked to be transferred from the Marseille branch of the *Caisse de Mutualité sociale Agricole* (CMSA) to the Gap branch where her partner worked. According to the applicable collective agreement, requested transfers could be effected provided both branches involved agreed. When the Gap branch refused her request, the branch manager, asked to record<sup>221</sup> the reason for his refusal stated, ‘...I have learnt from experience not to recruit any close relation or marital partner as an employee.’ The local branch of the CFDT commenced criminal proceedings against the manager for breach of Art.L.123-1-b. Following acquittal by the *tribunal correctionnel*, the union appealed to the *Cour d’appel* of Grenoble which held that there had been no breach of Art.L.123-1-b for three reasons. First, the possibility of transfer was not a right but merely a facility within the employer’s discretion; second, the Art.L.123-1-b does not cover discrimination against the complainant’s essential ‘state’ as a married woman; third, the enterprise delegates’ register is an internal enterprise document and the element of publicity necessary to found a discrimination complaint was therefore absent. The *Cour de Cassation* rejected the third ground stating that Art.L.123-1 b contains no special publicity requirement and sent the case back to the *Cour*

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<sup>220</sup> See for example Cass. Soc. 4 November 1993, *CMSA v. M. Thépault* (LEXIS). CMSA challenged the decision of a social security tribunal awarding M. Thépault, a nurse, travel expenses for giving medical care to a patient outside his area on the grounds *inter alia* that the patient’s weight necessitated the presence of a male nurse. CMSA argued that, in so deciding, the tribunal had violated Art.L.123-1 c.trav. The court did not address this point and justified its decision on other grounds. In the context of Art.L.140-2 c.trav. see Cass.Soc. 15 December 1991, *Sté Nautimar v. Mlle Belenfant* (LEXIS). Here, an employer attempted to alter a contractual agreement under which it had agreed to pay the employee, a fixed-term part-time employee brought in to deal with an upswing in business, more per hour than full-time employees. The employer argued that Art.L.140-2 c.trav. obliges an employer to ensure, for the same work or work of equal value, identical remuneration for all employees in the enterprise. The Court simply stated that the lower court had correctly reached its decision through interpretation of the common intention of the parties. Art.L.140 c.trav. is also frequently used as a definition of pay in cases not dealing with equal pay.

<sup>221</sup> By the enterprise delegates using powers under Art.L.424-5 c.trav.



*d'appel* of Lyons for further consideration.<sup>222</sup> This appeal court held that, on the facts, there had been no discrimination. According to the court, it had not been established that a transfer request had been made and that, even if such a request had been made, the complainant was still single at the time of the request. Nor had it been established that, between the date of the alleged act and the marriage of the complainant, a vacant position had arisen in the Gap branch or that the Gap branch had refused to employ Mme Aghabian. The union returned, for the second time, to the *Cour de Cassation*, arguing that the *Cour d'appel* had failed to draw the correct conclusions from the evidence presented to them, particularly the written statement of the manager. The *Cour de Cassation* refused to overturn this decision on the ground that, as there was no position into which the complainant could have transferred, the simple declaration of intention by the manager could not constitute the refusal to transfer required by Art.L.123-1 b.<sup>223</sup>

The third case on Art.123 concerns a challenge by the *Caisse nationale d'assurance vieillesse des travailleurs salariés* (CNAVTS) before the Social Chamber against a decision of the Versailles *Cour d'appel* in favour of Mme Duchemin. Chapter XIII of the CNAVTS works rules stated that all employees who have been present in the enterprise for at least six months in each calendar year must be given a staff report. In 1987, Mme Duchemin was on sick leave from May 7 to September 1 and on maternity leave from September 2 until the end of the calendar year. The employer refused to give her a staff report on the ground that she had been present for only 124 days in 1987. Mme Duchemin challenged this refusal as contrary to Art.L.123. The Versailles *Cour d'appel* upheld her claim. The Court referred to Art.3 b of a collective agreement protocol which stated that maternity leave had to be counted as time spent in the enterprise where this was relevant for progress in the job hierarchy. As the works rules referred only to 'six months' of presence' without further qualification, the terms of the collective agreement could be applied. Moreover, the court held that it was settled law that suspension of the contract of employment affects only its execution and has no effect on the 'presence' of the employee in the enterprise.<sup>224</sup> Furthermore, it held that it could not seriously be sustained that the refusal to give a staff report was not based on sex, but on the suspension of the employment contract which affected both

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<sup>222</sup> Cass. Crim. 23 October 1990, Bulletin Criminel.

<sup>223</sup> Cass. Crim. 12 May 1992 (LEXIS).

<sup>224</sup> On 'suspension' of the contract of employment during maternity leave, see further Chapter 5 at Section 3.5.1.3.

sexes equally. It was clear that the addition of Art.3 b to the collective agreement was intended to address precisely this sort of injustice.

The *Cour de Cassation* overturned this decision on two grounds. The first was that Art.3 b of the annexe to the collective agreement applied only to those matters laid down in the agreement itself. The second was that, as the condition of absence which prevented the granting of a staff report applied without distinction to both sexes, it did not lead to sex-based discrimination.<sup>225</sup>

The remaining cases utilising national provisions concern Art.L.140 Labour Code. In 1992, the Social Chamber considered whether the *Cour d'appel* of Paris had reached the right decision in deciding that paying the female spouse of a caretaking couple half of her husband's wages breached Art. L.140. The *Cour de Cassation* rejected the employer's argument that the lower court had failed to examine whether the jobs of the female and male caretaker involved specific tasks, stating that the lower court, having examined the evidence before it, had correctly concluded that the two spouses carried out the same work and that Mme Domice had to receive the same pay as her husband.<sup>226</sup> Similarly, where a newly hired male employee was paid more than a female employee with several years' experience for the *same* work, the Versailles Appeal Court decided that the equal pay provision had been breached on the ground that the alleged difference in knowledge levels had not been established.<sup>227</sup>

By contrast, a female engineer's claim that her failure to reach the top level of her pay scale breached Art.L.140-2 was rejected by a Paris *Cour d'appel*. The court stated that her title as a doctor of physical sciences was insufficient to establish her claim. The principle of equal pay had to be evaluated in the light of a number of elements made up, not just of knowledge of a job attested by a qualification, but also experience, responsibility, skills and aptitude. The fact that she had begun work with her employer at the age of 37, that her job did not entail exceptional responsibilities and that her state of health had necessitated her transfer into documentation work,

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<sup>225</sup> Cass. Soc. 30 March 1994, Bulletin Civil; see also *Droit Social* (1994) 561-2 with note by M-A Moreau. But see *infra* discussion of *Mme Thibault* at n.249 and accompanying text.

<sup>226</sup> Cass. Soc. 19 February 1992, *Caisse d'Epargne Ecureuil de Paris v. Mme Domice*, Bulletin Civil.

<sup>227</sup> CA Versailles 15 April 1985 in *Droit du Travail*, August-September 1988, 4.

justified her current classification and none of the elements of comparison raised in argument were sufficient to alter this conclusion.<sup>228</sup>

In the *Mlle Pullès* case,<sup>229</sup> she claimed equal pay with three other male technicians at a radiology centre on the grounds that, unlike her comparators, she had to pay contributions to a complementary insurance scheme and that, unlike her, her comparators received sick pay from the first day of illness without taking into account the three day delay applied by the social security scheme. She appealed against the *Cour d'appel* of Grenoble decision dismissing her claim on three grounds. First, the appeal court had violated Art.L.140 in stating that the employer had ensured equal pay between men and women, and that the pay difference was justified by the excellence of the work supplied and fidelity to the enterprise demonstrated by the comparators. Second, the appeal court had not responded to her evidence of three identified cases in which male pay was higher than hers. Third, all the constitutive elements of a collectively acquired right were present.

The Social Chamber rejected her claim on two grounds. First, they stated that the lower court, in addressing the allegedly neglected evidence, had demonstrated that an examination of pay practices in the enterprise revealed no particular distortion of her salary, that her pay had evolved normally and that the difference between her pay and that of her selected comparator was explained by the extra tasks he carried out. Secondly, the lower court had shown that the advantages claimed by the employee had been awarded on a discretionary basis to other employees on different dates as a reward and without precise rules. Therefore, the appeal court was entitled to conclude that their granting did not constitute a custom in the enterprise.

As regards the Criminal Chamber, it has decided three equal pay cases, two of which arose in the context of the same litigation.<sup>230</sup> The case involved two sets of comparisons. The first comparison was between thirteen female employees who worked on a press and were classified at category

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<sup>228</sup> CA Paris 15 January 1988, *Dame Blériot v. Commissariat à l'énergie atomique* in *Droit du travail*, May 1988, note 198.

<sup>229</sup> Cass. Soc. 16 March 1989, *Mme Pullès v. Centre de Radiologie de Romans*, Bulletin Civil.

<sup>230</sup> The action originated in a warning by the Labour Inspector and the subsequent commencement of criminal proceedings by the CGT.

2 coefficient 145 and three male employees of the same category and coefficient who were paid more. The second comparison was between a female stock manager and orderer, classified at category 2 coefficient 145 and a male storehand, classified at category 3 coefficient 155 and paid more.<sup>231</sup> The manager was convicted (and the company held civilly liable) both by the court of first instance and the appeal court. The Criminal Chamber accepted the lower court's conclusions on the stock manager/storehand comparison, but stated that the lower courts had not fully considered the requirements of Art.L. 140-2 in carrying out the thirteen employee comparison.<sup>232</sup> The lower court had decided solely on the basis of the physical and mental burdens imposed on the female employees and their comparators, and had failed to consider the employer's arguments that the difference in pay was justified by the comparators' multiskilling and longer period of training. This part of the case was therefore remitted to the *Dijon Cour d'appel* for a decision. This court found for the employees.

When the case came before the *Chambre Criminelle* for a second time,<sup>233</sup> the employers argued that the court had decided on a hypothetical ground in holding that the training of male employees did not appear to be longer than that of their female colleagues and that it had not drawn the appropriate legal conclusions from its findings concerning the multiskilling of the male workers. The *Chambre Criminelle* rejected these arguments. It stated that the appeal court had considered the mental demands imposed on female workers to be equivalent to the physical demands made of male workers, that no evidence had been produced to show that the training of male employees was longer than that of female employees, and finally that the multiskilling referred to did not correspond to performing different tasks requiring different qualifications, but consisted only in performing the same work in different parts of the factory. The work was therefore of equal value.

In 1996, the Criminal Chamber heard its third equal pay case.<sup>234</sup> The *partie civile* appealed

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<sup>231</sup> On the French system of job classification see Saglio, 'Les négociations de branches et l'unité du système français de relations professionnelles: le cas des négociations de classification', *Droit Social* (1987) 20 and, for the historical development of job classification, by the same author 'Hiérarchies salariales et négociations de classifications, France 1900-1950', *Travail et Emploi*, March 1986, 7.

<sup>232</sup> Cass. Crim. 31 May 1988 (LEXIS).

<sup>233</sup> Cass. Crim. 6 November 1990 (LEXIS).

<sup>234</sup> Cass. Crim. 26 March 1996 (LEXIS).

against the rejection of her pay discrimination claim by the Paris *Cour d'appel*. The case seems to have been argued under both the provisions of Art.L.123-1 c and Art.L.140. The appeal court, after citing the provisions of Art.L.123-1 c, stated that 'in a case of pay discrimination, the mere establishment of pay differences is insufficient to establish criminal liability as these differences could have several causes. It must be shown that the pay differences result from discrimination attributable to the sex of the employee concerned.' It went on to say that the facts, rather than evidencing discrimination, showed that in some instances, female employees were paid more than male colleagues performing equal work. The *partie civile* argued before the *Cour de Cassation* that the appeal court, in addressing itself to the Art.L.123-1 c provisions, had failed to examine the Art.L.140 provisions. She argued that, for Art.L.140 to be applied, it is sufficient that a woman is paid less than a man doing the same work in the absence of an objective justification other than the claimant's sex. Therefore, unlike the situation under Art.L.123, there was no further need to establish that sex was taken into consideration in determining pay. She further argued that the appeal court's failure to address the Art.L.140 point meant that essential arguments had been ignored. Principally, she argued that all executive employees (*cadres*) in the company were at the same level and were interchangeable. However, of all the executive employees, she was the only one who did not receive a variable pay element on top of a fixed salary. This had the consequence of her receiving half, or in some cases a third, of the remuneration received by her male colleagues. When she had asked her employer for these commission bonuses, he had replied that his associates were opposed to female executives receiving such high bonuses.

Her appeal was rejected by the Criminal Chamber because it was satisfied that the appeal court had fully considered all the arguments before it and that therefore there was insufficient evidence to establish pay discrimination.<sup>235</sup>

The final decision under the equal pay provisions is important, not just because of the reasoning it adopted, but because it is the only case out of those decided under national provisions to refer

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<sup>235</sup> These cases make us acutely aware of the crucial importance of fact construction and evaluation in discrimination cases. For an excellent discussion of this issue which examines US and UK courts, see Hepple, 'Judging Equal Rights', *Current Legal Problems* (1983) 71.

to ECJ jurisprudence, more specifically to the *Enderby* decision.<sup>236</sup> The case involved the comparison of two packers on the same coefficient. The female packer was paid the equivalent of just over £3 per hour and the male comparator was paid almost £5 per hour. The *Conseil de Prud'hommes* stated that, as the employer had provided insufficient evidence to allow it to ascertain whether the jobs were of equal value, the employee benefited from Art.L. 140-8, which states that employees must receive the benefit of any doubt. The employers appealed, stating that the pay difference was justified on the grounds that the women only sorted mushrooms whilst the men had to load and unload lorries which involved heavy lifting, and that only the comparator worked at night.

Although the employer stated that the relative proportions of male and female packers were unknown, the court stated that it was in any case clear from the company's submissions that women packers were systematically paid less than male packers. The court then held that according to *Enderby*, in a situation of apparent discrimination, it is the employer who must demonstrate that objective reasons exist for the pay difference. Furthermore, under Art.L. 140-2 each employer is bound to ensure equal pay between men and women for the same work or for work of equal value and that, under Art.L. 140-8, when an equal pay case is brought, the employer must provide the court with all the information necessary to justify the pay inequality.

On the employer's proffered justifications, the court held that even if these were proved (and the comparator's pay slips provided no evidence that he worked at night) they were insufficient to justify the difference in pay. Hence, the mere difference of physical strength did not justify the exclusion of women from such jobs. Moreover, it appeared from the evidence that the female packers also carried out heavy physical work in gathering, collecting and sorting the mushrooms. Furthermore, the applicable collective agreement made no distinction between the functions of packers on the same coefficient. Finally, as the *Conseil de Prud'hommes* had rightly concluded, the company had failed to prove that the women's work was not of equal value to that of the men and that, therefore, the case of pay discrimination was proved.

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<sup>236</sup> CA (Chambre Sociale) Riom 16 January 1995, *SARL USAI Champignons v. Mme Fabienne Douarre* reported in *Droit Social* (1995) 441. On *Enderby* in the UK courts see *supra* n.103 and accompanying text.

## 4.2 Cases using a mixture of national and supranational sources

The vast majority of this litigation came from male employees in the wake of the condemnation of France by the ECJ in 1988 for failing to provide a mechanism to cleanse collective agreements of female-specific advantages which did not fall within one of the exceptions to the ETD.<sup>237</sup> Following this ruling, legislation was passed in 1989,<sup>238</sup> modifying Art. 19 of the 1983 law, which gave the social partners two years (until 10 July 1991) to place their collective agreements in conformity with the requirements of Art. L. 123 Labour Code.

Four types of female-specific advantage were challenged in the cases. The first was a crèche bonus for mothers set out in a protocol agreement of 2 July 1968 annexed to the collective agreement for social security office personnel. The second was a period of two days leave per child under fifteen per year for mothers, established in a protocol agreement of 1971 attached to the collective agreement for social security office personnel.<sup>239</sup> The third was a 'care costs' bonus for mothers with children under five in one private company. The fourth involved two payments in a collective agreement at Renault, one a lump sum 'birth' payment to mothers of 2000F and the other a monthly care payment of 150F per child under three to mothers, single or divorced fathers and widowers. In each case, the male employees concerned sought compensation for the periods before these female-specific benefits were extended to male employees fulfilling the other eligibility criteria. Apart from Renault, all of the female-specific advantages in question had been extended to male employees in the wake of the 1989 law.<sup>240</sup>

As all of the crèche bonus cases are decided on almost identical grounds, the case brought by M. Ferandin and M. Perrier against the *Caisse Primaire d'Assurance Maladie de la Mayenne*

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<sup>237</sup> Case 312/86 *Commission v. France* [1988] ECR 6315. See also *supra* n.192, Chapter 5 at XXXXX and Chapter 6 at XXXX.

<sup>238</sup> Law No.89-488 of 10 July 1989, art.8.

<sup>239</sup> In the case taken against the national organisation (CNAM) rather than the regional branches (CPAM), a different provision in a collective agreement is challenged.

<sup>240</sup> But see Chapter 5 at n.170.

(CPAM) will serve to illustrate the courts' approach.<sup>241</sup> The CPAM put forward three arguments before the *Cour de Cassation* in an attempt to overturn the lower court's decision. Their first argument was that the crèche bonus was not pay but a measure aimed at promoting equal opportunities between men and women. Secondly, they argued that the ETD was not directly applicable in the national legal order and, therefore, a judgment by the ECJ in the context of infringement proceedings did not have the effect of importing the text of the directive into the national legal order. Finally, even if a Member State failed to properly implement a directive within the prescribed time limit, the directive could only be applied by national courts to the extent that the directive was sufficiently precise and unconditional; the ETD, particularly in the light of Arts. 2(3) and 2(4), did not fulfil these conditions. These arguments were all flatly rejected. The *Cour de Cassation* stated simply that, under Art.119 and Art.L.140-2, the crèche bonus was pay and the *Cour d'appel* had correctly ordered the CPAM to pay the crèche bonus to male parents who fulfilled the conditions laid down in the agreement.

In the 'child leave' cases the CPAM made similar arguments on the non-pay nature of the benefit and the effect of the ETD in the national legal order. It did, however, put forward a number of arguments which differ from those in the 'crèche bonus' litigation. It argued that the child leave fell within Art.2(3) ETD. It also made a number of arguments on retroactivity. According to the CPAM in these cases, the lower courts had deprived their decisions of any legal foundation in holding that France's failure to comply with the ETD justified the retroactive application of the 1990 modification of the collective agreement without examining whether the 1990 protocol explicitly permitted retroactive application. Child leave could only be taken during the period laid down by the collective agreement. As the employees concerned had not taken their child leave in each of the annual periods laid down in the collective agreement, they could not claim financial compensation. There was no evidence that the employees, before 1989, had asked for, or were refused, child leave.

In all but one of the cases decided by the Social Chamber of the *Cour de Cassation* on child leave,

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<sup>241</sup> Cass. Soc. 27 February 1991, Bulletin Civil (see also the lower court decision by the Cour d'appel d'Angers overturning the Conseil de Prud'hommes decision in this case reported in *Droit Ouvrier* (1990) 368; Cass. Soc. 27 February 1991, *CRAM v. M. Touray* (LEXIS); Cass. Soc. 3 October 1991, *CPAM, CAF & URSSAF v. M. Carteron et autres* (LEXIS); Cass. Soc. 10 June 1992, *CPAM v. M. Leborgne* (LEXIS); Cass. Soc. 25 June 1992, *CPAM v. M. Petit* (LEXIS).



these arguments were rejected in their entirety.<sup>242</sup> Compensation for child leave was pay within the meaning of Art.119 and Art.L.140-2. Under Art.L.140-4, all collective provisions which, contrary to Art.L.140-2 and Art.L.140-3, pay workers of one sex less than workers of the other sex for the same work or work of equal value are null and the higher pay must be substituted for that contained in the nullified provision. As for the non-retroactivity arguments, the court decided that as employees were placed by the employer in a situation which made it impossible for them to take the child leave in the period when it should have been taken, these arguments would not be accepted. In one child leave case,<sup>243</sup> however, the same court decided that although compensation for child leave was pay within the terms of Art.119 and Art.L.140-2, it could not accumulate, during the same period, with pay. In holding thus, without examining whether the employees, during the disputed period, had asked for the paid leave and whether the employer had refused, the *Conseil de Prud'hommes* had failed to base its decision on proper legal grounds. The case was sent to another *Conseil de Prud'hommes* for further consideration on this point.

The third case deriving from the infringement proceedings against France is a *Conseil de Prud'hommes* decision. A number of male employees claimed a 'care costs' bonus given to mothers with children under five since 1975. The company contended that the bonus was not pay, and that, in any case, the employees could only claim the bonus from 10 July 1991, the date by which the social partners were obliged, under the 1989 law, to cleanse their collective agreements of discriminatory clauses. The *Conseil de Prud'hommes*, referring to the decisions by the courts in *Ferandin & Perrier*,<sup>244</sup> stated that it was a mistake to attempt to apply the 1983 law and the ETD here. Consequently, it was necessary in examining the 'care costs' bonus to set aside reference to all legal provisions apart from Art.119 and its national translation in Art.L.140-2. Applying these provisions, it was clear that the provision granting the bonus was unequal in reserving the bonus for mothers only and therefore the company was bound to backdate payment

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<sup>242</sup> Cass. Soc. 9 April 1996, *CPAM du Calvados v. M. Benoist et autres* (LEXIS); Cass. Soc. 9 April 1996, *CPAM du Calvados v. M. Brunet et autres* (LEXIS); Cass. Soc. 9 April 1996, *CNAM v. M. Aurran et autres* (LEXIS); Cass. Soc. 18 July 1995, *CPAM de Sarreguemines v. M. Hanaeur et autres* (LEXIS).

<sup>243</sup> Cass. Soc. 19 July 1995, *CPAM de Sarreguemines v. M. Hanus et autres* (LEXIS).

<sup>244</sup> *Supra* at n.241.

of this bonus to the male employees.<sup>245</sup>

Finally, the *Cour de Cassation* agreed with the *Conseil de Prud'hommes* decision and rejected Renault's arguments that neither the birth nor the care payment contravened the principle of equal pay.<sup>246</sup> As the birth payment was also given to adoptive mothers, the lower court, 'had rightly held that it was not a measure destined to protect pregnancy or maternity or to promote equal opportunities between men and women, but a pay supplement aimed at compensating the employee for the extra expenses linked to the presence of a child in the home, expenses which men have to face as well as women.'

Two other cases of considerable interest have been argued using a mixture of national and supranational sources.<sup>247</sup> The first involves the first attempt by an employee to argue indirect discrimination before the *Cour de Cassation* and the second produced the first Art. 177 reference by the *Cour de Cassation* on sex equality.

Mme Soufflet began working for CPAM in 1983 and was promoted on a number of occasions. In 1987, at her request, she began working part-time. In 1989, she was refused a further promotion on the grounds that her hours spent acquiring job experience were insufficient. She commenced proceedings before the *Conseil de prud'hommes*, asking for compensation and regrading at the higher coefficient. On appeal from the *Cour d'appel* of Reims, she presented two main arguments.<sup>248</sup> The first was based on Art.L.212-4-2 c.trav. which lays down a general principle of equal treatment between part-time and full-time employees subject to specific clauses in collective agreements. She claimed that the lower court wrongly applied this provision in stating that it permitted the employer to double the amount of time required for a part-time employee to obtain a higher grading coefficient. The second was based on Art.119, the ETD and

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<sup>245</sup> Conseil de Prud'hommes d'Als (Section Industrie/Juge Départementaire) 21 April 1993, *M. Balaguer et autres v. Société Alcatel Câbles* published in *Droit Ouvrier* (1993) 390.

<sup>246</sup> Cass. Soc. 8 October 1996, *Sté Renault v. M. Alain Chevalier* (LEXIS).

<sup>247</sup> See also Cass. Soc. 17 December 1992, *M. Herrou v. EDF* (LEXIS). The applicant claimed a breach of everything from French national equality sources to supranational and international equality sources in an unsuccessful challenge to his employer's failure to promote him.

<sup>248</sup> Cass. Soc. 9 April 1996, *Mme Christine Soufflet v. CPAM de la Marne*, Bulletin Civil.

Art.L.140-4 c.trav. It was argued that requiring part-timers to have a longer employment duration in order to qualify for promotion and, therefore, higher pay, discriminated against women when it was shown that in fact a considerably smaller percentage of men than women worked part-time, unless the difference in treatment was objectively justified by non-sex based factors. The lower court had failed to determine whether the employer had justified the difference in treatment between full-time and part-time employees.

The *Cour de Cassation* rejected both grounds of appeal. It held that Art.5 of the 20 July 1975 protocol, which states that the length of employment experience required must be lengthened in relation to reductions in working time, was a collective clause concerning the right to promotion within the meaning of Art.L.212-4-2 and did not infringe the principle of equality between full-time and part-time employees laid down in that provision. On the sex discrimination argument, it stated that the *Cour d'appel*, which had examined to what extent the disputed provision entailed sex discrimination, even indirect, had correctly decided that no discrimination had been established.

The second case, taken by Mme Thibault against CNAVTS,<sup>249</sup> involved almost identical facts to the case of Mme Duchemin, discussed above.<sup>250</sup> Both women were refused a staff report due to a combined absence on sick leave and maternity leave of more than six months in a calendar year. The lower court decided in Mme Thibault's favour on the grounds that the refusal was discriminatory. CNAVTS challenged this decision before the Cour de Cassation, utilising the same arguments that this court had used the year before to reject Mme Duchemin's claim. They further argued that the failure to give her a staff report could not be considered as discriminatory as the principle of employment equality can only apply to rights which are potentially open to employees of both sexes. The Court this time stated that the case, in the light of Art.L123-1 and the ETD, raised a serious difficulty with regard to the interpretation of the ETD and referred the issue to

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<sup>249</sup> Cass. Soc. 28 March 1995, *Mme Thibault v. CNAVTS*, Bulletin Civil; also published in *Droit Social* (1995) 1036-1037 with a note by M.A. Moreau.

<sup>250</sup> See *supra* n.225.

the ECJ.<sup>251</sup>

#### 4.3 Cases utilising purely supranational equality sources

Cases under this heading cover only two issues: the ban on female night work in Art.L.213-1 Labour Code and the ban on employing workers on a Sunday in Art.L.221-5 Labour Code. The night work cases are discussed in Chapter 6 and concern the lowest courts in the French criminal court structure. 23 Sunday opening cases, all argued in similar terms, were taken by employers, found guilty of breaching the penal sanctions attached to this ban, before the Criminal Chamber of the *Cour de Cassation* in 1995.<sup>252</sup> The employers' only argument in each case was that the ban on Sunday working constituted indirect discrimination against women and hence breached Art.119 and the equality directives, in that the majority of Sunday workers in the enterprises concerned were women. Preventing employees working on a Sunday therefore disproportionately deprived women of pay and job opportunities, which constituted a breach of Community law. The court paid short shrift to this line of reasoning stating simply that the rule establishing Sunday as a day of rest was taken in the interest of workers, men and women, and constituted a social benefit and therefore its enforcement was not of a nature to lead to discrimination, either direct or indirect, to the detriment of women.

#### 4.4 Cases before the Conseil d'Etat

The situation up to the decision by the ECJ in 1988 in the Art. 169 action taken against France on public service recruitment has already been discussed in Chapter 1.<sup>253</sup> In the wake of that decision, four challenges to administrative decisions or regulations on the ground that they were

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<sup>251</sup> The *Cour de Cassation* asked, 'Must Arts.1(1), 2(1), 5(1) and, ultimately, 2(4) of Directive 76/207 be interpreted to mean that they prohibit depriving a woman of the right to a staff report and, as a result, to benefit from the possibility of promotion, because she was absent from the enterprise on maternity leave?' The AG has answered this question affirmatively. See further Chapter 5 at n.163.

<sup>252</sup> The cases are decided in three 'clumps', five on the 27 June 1995, nine on 30 May 1995 and nine on 10 January 1995. One is published in the *Bulletin Criminel*, Cass. Crim. 30 May 1995; the rest are unpublished. The cases come from ten different appeal courts from all over France, though thirteen alone come from the *Cour d'appel* of Nancy.

<sup>253</sup> See Chapter 1 at Section 2.1.4.

discriminatory were taken before the *Conseil d'Etat*.

In the first case,<sup>254</sup> SGEN-CFDT (a branch of the national education union) challenged the Minister of Education's refusal to repeal two provisions establishing sex-based representation on certain disciplinary teachers' committees on the ground that these provisions were incompatible with the constitutional principle guaranteeing equal rights in all spheres for men and women. The *Conseil d'Etat* based its decision solely on the 1946 Preamble to the Constitution. It stated that this provision prohibited sex-based distinctions in public service employment except those which are justified by the conditions of exercise of the functions of those jobs, the need to protect women or the promotion of equal opportunities between men and women. Having ascertained that none of these justifications were present, the provisions were adjudged incompatible with the constitutional principle of equality, and hence were illegal and annulled.

The following year, the *Conseil d'Etat* heard another complaint against the Minister for Education. In this instance, Mme Buret's application to be transferred into a post as a specialised teacher in a prison was turned down on the ground that a female teacher would encounter difficulties maintaining discipline with male prisoners. The court, using the same constitutional interpretation and justification formula as the year before, stated that none of the evidence produced had shown that the conditions of exercise of the job could not be carried out by a female public servant. Therefore the Nancy administrative tribunal had correctly annulled the decision.<sup>255</sup>

In 1993, the *Conseil d'Etat* considered the case of Mlle Martel, an Air School graduate, who had been denied access to the air officers corps by the Minister of Defence on the ground that Art.2 of a decree of 10 March 1983 stated that, 'because of the conditions of establishment and intervention of air combat units, the air officers corps is only open to male graduates of the Air School'. Women could only enter this corps if they had graduated from a different Military Air School. The *Conseil d'Etat* annulled this decision on the ground that the discrimination was not justified.<sup>256</sup>

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<sup>254</sup> CE 26 June 1989, *Fédération des syndicats généraux de l'éducation nationale et de la recherche* (LEXIS).

<sup>255</sup> CE 7 December 1990, *Ministère de l'Education Nationale v. Mme Buret* (LEXIS).

<sup>256</sup> CE 29 December 1993, *Affaire Mlle Marie-Christine Martel* (LEXIS).

Finally, in 1994, the SGEN-CFDT attacked a note of service issued in 1991 by the Minister of Education in which the organisation of transfers of physical education teachers distinguished between posts for female and male teachers. For the first time, the *Conseil d'Etat* did not base its decision on the constitutional equality principle but on *inter alia* the ETD, the 1982 law implementing the ETD in the public service, the *Loi Roudy* and the 1988 decree which France had introduced in the context of the Art.169 proceedings, eliminating sex-based recruitment for physical education teachers. As the Minister had no text to rely on for the provision, it was annulled.<sup>257</sup>

## 5. Reviewing the case law landscape: dialogue(s) between sources?

Curtin and Mortelmans have given us a new set of markers with which to measure the development of Community law and its relationship with the 'low-politics' side of the institutional coin: the application and enforcement of Community law.<sup>258</sup> They brilliantly characterize the ECJ's activities in the field of promoting effective protection of Community law rights as having passed through three (non-linear) generations. The first generation cases, exemplified by *Van Gend en Loos*,<sup>259</sup> concern establishing and maintaining the cornerstones of supremacy and direct effect to ensure substantive Community provisions are not impeded by conflicting national provisions. The second generation<sup>260</sup> deals with remedies for Community rights, whose existence are assured by the first generation, but which interferes with national procedural autonomy only to ensure that Community rights are not discriminated against at national level and are not impossible to enforce. In the third generation, the Court, in order to ensure greater effectiveness of Community law rights, steps over the lines drawn in the sand by the second generation and begins to examine the content and adequacy of the national remedy and lays down guidelines for uniform Community-

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<sup>257</sup> CE 4 November 1994, *Syndicat général de l'éducation nationale SGEN-CFDT*, Recueil Lebon.

<sup>258</sup> 'Application and Enforcement of Community law by the Member States: Actors in Search of a Third Generation Script' in D. Curtin and T. Heukels (eds) *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers* Volume II (Martinus Nijhoff: Dordrecht, 1994) 423.

<sup>259</sup> Case 26/62 *Van Gend en Loos v. Nederlandsie Tariefcommissie* [1963] ECR 1.

<sup>260</sup> For example, *Rewe supra* at n.159.

defined remedies.<sup>261</sup>

A modified version of this typology can be usefully employed to draw together some of the aspects of the very different equal treatment case law landscapes we have seen develop in French and British courts and at ECJ level in this chapter. I wish to examine the development of three different generations of dialogue between the ECJ and the national courts. Three preliminary points should be stressed. First, these dialogues are cumulative and continuing rather than representing three different time-bound periods. Second, the principal concern is to characterise the use by French and British courts of EC sources, rather than the use by the ECJ of equality sources.<sup>262</sup> Finally, dialogue here does not mean considering solely preliminary references made by French and British courts to the ECJ on the ETD, EPD or Article 119. While this constitutes a vital and special type of dialogue, it is clearly not the alpha and omega of dialogue between courts on equality sources.

The first generation can be characterised as an *internal* and *absorptive* dialogue between sources. By this I mean that the ECJ has developed a rich databank of equality concepts available for utilisation by national courts. To give just some of the most important examples, it has developed an expansive definition of pay,<sup>263</sup> the notion of transparency,<sup>264</sup> a definition of objective justification,<sup>265</sup> guidance on how *prima facie* cases of indirect (or apparent) discrimination may be established<sup>266</sup> and in what situations direct discrimination may be established.<sup>267</sup> Furthermore, Community law sources which have not been subject to ECJ interpretation can be interpreted by the national courts and used to clarify or enhance justification of particular decisions. Theoretically at least, these can be incorporated into, and enrich, national equality sources in litigation before

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<sup>261</sup> For example, *Marshall (No. 2) supra* at n.141 and *Francovich supra* at n.163.

<sup>262</sup> A critique of the ECJ's use of equality sources in the area of night work is developed in Chapter 6.

<sup>263</sup> For example, *Bötel supra* at n.147.

<sup>264</sup> Case 109/88 *Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening* [1989] ECR 3199.

<sup>265</sup> See *Bilka supra* at n.45 and *Rinner-Kühn supra* at n.145.

<sup>266</sup> *Enderby supra* at n.103 and accompanying text.

<sup>267</sup> *Dekker infra* Chapter 5 at Section 3.3.3 and *P v. S supra* at n.100.

national courts. Hence, the national courts can absorb the Community equality concept into its internal sources.

In the second generation of dialogue, such (fairly) straightforward incorporation is not possible. In order to give effect to the substantive Community equality right, it is necessary for the national court to either disapply national rules in order to ensure conformity with Community law sources or rewrite national provisions so that they accord with the content of the Community equality right.

In the third generation of dialogue, national courts are called upon to utilise Community sources (which may not be equality sources) to set aside procedural and remedial limits in national law which prevent full enjoyment of a Community equality right.

To anticipate my conclusions, it will be argued that the French courts have scarcely got off first base in first generation dialogue, and been effective in narrow areas in second and third generation dialogue. The UK courts had already developed their own interpretations of some of the issues before dialogue between equality sources emerged. They engaged in a wide-ranging first generation dialogue, although their willingness to do so, and the techniques involved in dialogue, depended on the structuring of national provisions. In the second generation, it is necessary to distinguish between the disapplication of national rules and the rewriting of national rules. With regard to the former, the lowest courts (ITs) and the highest courts (the House of Lords) seemed much more prepared to engage in this task than the EAT and the Court of Appeal. With regard to the latter, UK courts were generally, with some notable exceptions, unprepared to rewrite national legislation in order to accord with EC interpretations. The story of the third generation dialogue has so far been stormy. The UK courts were prepared to engage in third generation dialogue when the practical implications were not great, but batted down the hatches when the ramifications of continuing dialogue loomed larger and larger.

### **5.1 First generation dialogue**

Before looking at first generation dialogue in the UK, it is important to remember that substantial



development of the SDA has occurred in the absence of dialogue with supranational sources. Indeed, in the 1970s, interpretation of the SDA was, for all intensive purposes, purely internal.<sup>268</sup> This does not mean that internal development is not relevant to understanding dialogue between sources. On the contrary. It was and is crucial for two principal reasons. First, the meanings of the statutory definitions of direct and indirect discrimination began to be fleshed out. Second, certain actions were clarified as definitively falling within an exception to the SDA. The 1970s caselaw on s.6(4) is a good example of this.<sup>269</sup> Furthermore, in all three decades, the UK courts have substantially developed the meaning of certain aspects of the SDA without any recourse to dialogue with supranational sources. The issues of when to draw inferences of direct discrimination and deciding whether the test for direct discrimination is causative or reasoned are the most significant illustrations of this.<sup>270</sup>

The UK courts have engaged in wide-ranging first generation dialogue with supranational sources. This fact that this dialogue has not taken place on virgin interpretative territory has, however, significantly influenced the extent and content of this dialogue. The fact that interpretation of national sources was already taking place in areas covered by many of the ECJ's interpretations undoubtedly made it more probable that wide-ranging dialogue would occur, given that litigants would plead and exploit this new supranational resource. On content, the fact that the UK courts had already developed dialogue-independent interpretations in certain areas meant that they were more likely to impose a national 'gloss' on an ECJ interpretation. The reception of *Bilka* in *Rainey*<sup>271</sup> and *Hampson*<sup>272</sup> is a good example of this as is the reception of the ECJ judgment in *Jenkins* by the EAT.<sup>273</sup> Finally, the British courts' use of the EC Code of Practice on Sexual Harassment provides a perfect example of the integration of Community equality sources (not

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<sup>268</sup> *Supra* Section 2.1.

<sup>269</sup> *Supra* at n.12 and accompanying text.

<sup>270</sup> *Supra* at Sections 2.2.1.2., 2.2.1.3. and 2.3.1.

<sup>271</sup> *Supra* at Section 2.2.2.3.

<sup>272</sup> *Supra* at n.123 and accompanying text.

<sup>273</sup> Upon reception of the ECJ ruling in *Jenkins supra* at n.147, which seemed to imply that intention was a necessary element of indirect discrimination, the EAT preferred to turn to the understanding of indirect discrimination in UK law where case law had clearly established that intention was not necessary to establish indirect discrimination; *Jenkins v. Kinggate (Clothing Productions) Ltd (No.2)* [1981] IRLR 388.

subject to ECJ interpretation) into what was itself an innovative interpretation of the SDA.<sup>274</sup>

Unlike the UK, France has had very little internal interpretation of discrimination sources. The low levels of litigation have produced, on the whole, little development in the depth of discrimination concepts. By depth is meant the extent and sophistication of judicial understanding of discrimination concepts. Straightforward cases of direct discrimination are rejected on unconvincing grounds.<sup>275</sup> Extremely simple like work cases are successful under Art.L-140<sup>276</sup> but the degree of rigour displayed in equal value cases varies widely. In both cases under Art.L-123 and Art.L-140, ECJ interpretations which could have been usefully employed are generally completely ignored. We can think of missed opportunities to consider the concept of transparency developed in *Danfoss*,<sup>277</sup> the part-time work jurisprudence<sup>278</sup> and the pregnancy jurisprudence.<sup>279</sup> The unthinkability of developing sexual harassment protection out of existing anti-discrimination rules illustrates the low expectations of spontaneous conceptual developments arising from the 1983 provisions. An extremely limited example of first generation dialogue can be found in the creche-bonus and child-leave cases where the French courts applied both Art.119 and Art.L.140-2 to confirm, in the wake of a 1988 ECJ judgment as a result of infringement proceedings, that these benefits constituted pay.<sup>280</sup> The *Conseil d'Etat* decided all but one of the challenges post-1988 on the basis of purely internal sources.<sup>281</sup> The only case where reference was made to supranational sources was one which was directly addressed in the other set of infringement proceedings against France.<sup>282</sup>

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<sup>274</sup> *Supra* at Section 2.3.2.

<sup>275</sup> For example, Mme Aghabian *supra* at n.222-223.

<sup>276</sup> For example, Mme Domice *supra* at n.226 and CA Versailles *supra* at n.227.

<sup>277</sup> For example, Mlle Pullès *supra* at n.229 and Cass. Crim. 1996 *supra* at n.234.

<sup>278</sup> Mlle Soufflet *supra* at n.248.

<sup>279</sup> Mme Duchemin *supra* at n.225 and Mme Thibault *supra* at n.249.

<sup>280</sup> *Supra* at Section 4.2.

<sup>281</sup> *Supra* at Section 4.4.

<sup>282</sup> *Supra* n.257 and accompanying text.

A number of reasons can be put forward to explain the low level of first generation dialogue. The first is that, as we have seen, the French legislative map contains no explicit reference to the concept of indirect discrimination.<sup>283</sup> This meant that there was no easy way of identifying and integrating supranational developments in this area in the national courts.<sup>284</sup>

Secondly, examining the degree and type of interplay between national and supranational sources reinforces the conclusion reached in Chapter 2, that a sufficiently high level of institutional mobilisation around equality rights is essential for the substantive development of the discrimination concepts contained therein.<sup>285</sup> More specifically, a failure to litigate at national level has thus far placed severe limitations on the introduction and circulation of substantive developments in discrimination law formulated at EC level, chiefly as a result of rulings given by the ECJ in response to a preliminary reference. The only direct route into a national system, in the (near) absence of litigation, of substantive concepts elaborated by the ECJ, is through the taking of infringement proceedings by the Commission against that Member State. While this absence of litigation has not led to a total absence of discussion in French doctrine of the substantive concepts elaborated by the ECJ in its jurisprudence, it has contributed to a tendency to this jurisprudence being considered in a vacuum, with limited consideration of the impact this case law could have on the development of anti-discrimination concepts in France.

Thirdly, the need for first generation dialogue was (and is) arguably less pressing in France than in the UK. To some extent, it is true to say that in the absence of any prospect of legislative reform to improve employment protection at domestic level in the UK, equality sources, because of their supranational potential, have been pressed into service as the only possible method of attaining some gains for particular groups of employees. The arguments presented by Mme Soufflet before the *Cour de Cassation*<sup>286</sup> illustrate perfectly both that the need to create first

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<sup>283</sup> See Chapter 1 at n.25 and accompanying text.

<sup>284</sup> On its own, this would be a wholly inadequate reason. Many Member States make no reference in their national legislation to indirect discrimination but some of these have subsequently developed the concept in the light of ECJ jurisprudence. See further Prechal, 'Combating Indirect Discrimination in the Community Law Context', 1 *Legal Issues of European Integration* (1993) 81.

<sup>285</sup> See Chapter 2 at Section 8.

<sup>286</sup> *Supra* at n.248.

generation dialogue may be less pressing in France and that the need, while less pressing, still exists. Her principal argument before the court was not based on equality sources but on Art.L.212-4-2 of the Labour Code. This article defines precisely what is meant by part-time work and sets down the principle that part-time employees are to have the same legal and collective rights as full-time employees with the exception that collective agreements may lay down different rules for full and part-time workers. This article has been interpreted to mean that a part-time worker on a four days x 7.7 hours contract was entitled to a day's pay when a public holiday fell on one of the four working days.<sup>287</sup> With straightforward rights like this in place, the need to exploit the concept of indirect discrimination is less readily apparent. However, the need for indirect discrimination to be sufficiently developed to step into the breach is also apparent from the fact that Mme Soufflet lost her claim because of the exception for collective derogations from the equal treatment for part-timers principle. The court does not examine the indirect discrimination point very carefully.

Fourthly, it is arguable that the focus of the French legislative map was not geared towards the development of litigation on anti-discrimination rights and therefore did not create a propitious environment for first generation dialogue to develop. This argument is developed in greater detail in Chapter 4.<sup>288</sup>

However, there are signs - faint and sporadic, but visible - that the efforts of a few determined legal practitioners and academics to get first generation dialogue off the ground are beginning to bear some fruit. Articles have begun to appear questioning why French courts do not participate in first generation dialogue and pointing out areas in which the use of such dialogue could be useful.<sup>289</sup> The arguments before the court in *Mme Soufflet*, the preliminary reference in *Mme Thibault*, and the Riom appeal court decision which integrates *Enderby* into national equal pay

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<sup>287</sup> Cass. Soc. 10 November 1993, Bulletin civil.

<sup>288</sup> See Chapter 4 at Section 4.1.

<sup>289</sup> See in particular Lanquetin, 'De la discrimination indirecte entre travailleurs masculins et féminins', in F. Kessler (ed.) *Le Droit Collectif du Travail: questions fondamentales - évolutions récentes. Etudes en honneur à Madame le Professeur Hélène Sinay* (Peter Lang: Frankfurt, 1994) 415; Lanquetin, 'La preuve de la discrimination: l'apport du droit communautaire', *Droit Social* (1995) 435; Martin, 'Droit social et discriminations sexuelles: à propos des discriminations générées par la loi', *Droit Social* (1996) 562.

legislation<sup>290</sup> are in part the results of such efforts and have been given publicity because these same few people have written about these cases in labour law publications to illustrate their importance. It is arguable that this development is itself due to a different form of Community-sponsored dialogue. Those involved in attempting to get first generation dialogue off the ground were the French members of the EC Equality Expert Network<sup>291</sup> which has produced invaluable information on the situation in individual Member States, and provided important opportunities for equality law experts in all the Member States to exchange and explore the reasons for their very individual national experiences. It remains to be seen whether this momentum to create first generation dialogue can be sustained.<sup>292</sup>

## 5.2 Second generation dialogue

As stated above, the opportunity for this type of dialogue arises where straightforward integration of the Community equality source is impossible. In order to give effect to the substantive Community equality right, it is necessary for the national court to either disapply the national rule or reinterpret national provisions so that they accord with the Community law right. With regard to disapplication of national rules in the UK, where it was an exception to the SDA which blocked a potential application of Community law, the courts were prepared to engage in dialogue through the preliminary reference procedure in order to clarify the extent of the Community equality right. This was a particularly prevalent practice during the 1980s as the s.6(4) references and the reference in *Johnston v. CC RUC* show.<sup>293</sup> As courts and litigants gained familiarity with Community sources and the scope of supranational sources became clearer, they became more confident and from the late 1980s onwards, national courts applied Community law sources directly to declare certain national substantive employment rules unlawful in the light of the ETD and Art. 119. In terms of dialogue, the most remarkable feature of the cases decided under the

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<sup>290</sup> *Supra* respectively at n.248, 249 and 236.

<sup>291</sup> The most recent members being Christophe Pettiti, Hélène Masse-Dessen and Marie-Thérèse Lanquetin.

<sup>292</sup> Particularly since the Commission has disbanded the EC Equality Expert Network in its 4th Action Programme, COM (95) 381, Objective 6, where the Commission sets up a common coordinating structure, ANIMA to 'rationalise and replace existing structures and networks and therefore ensure a more cost-effective management of the programme'.

<sup>293</sup> See *supra* Section 2.2.3. for the s.6(4) references and n.69 for *Johnston*.

ETD<sup>294</sup> is that they represent decisions which are much bolder than any which the ECJ itself has made on indirect discrimination and the ETD.<sup>295</sup>

However, many of the decisions to disapply the national rule created rights only for public sector employees who could rely directly on the ETD. In order to allow private sector employees access to Community equal treatment rights the courts were asked to 'reinterpret' national legislation. British courts have generally been extremely reluctant to engage in this task.<sup>296</sup>

The most problematic second generation cases for the UK courts are those which concern neither an exception to the SDA (such as s.6(4)) which is not paralleled at EC level nor cases where the SDA does not apply and the ETD is employed to challenge other national provisions (such as *ex parte EOC*) but cases where a Community interpretation (or potential interpretation) challenges a core requirement of the SDA definitions of discrimination. In these cases, the appellate courts have adopted a number of strategies to deflect dialogue with supranational sources:

- sidestepping supranational interpretations;<sup>297</sup>
- refusing to refer;<sup>298</sup>
- refusing to reinterpret SDA definitions;<sup>299</sup>
- refusing to admit a potential difference between EC rights and SDA rights;<sup>300</sup>
- ignoring a pertinent EC authority.<sup>301</sup>

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<sup>294</sup> See, for example, *ex parte Schaffier supra* at n.44, *ex parte EOC supra* at n.144 and *ex parte Seymour-Smith supra* at n.146

<sup>295</sup> See the discussion of *Kirshammer-Hack supra* at n.206 and accompanying text.

<sup>296</sup> See *Duke supra* at n.77, *Finnegan supra* at n.131, *Porter supra* at n.133 and *Macmillan supra* at n.166.

<sup>297</sup> See the reception of ECJ pregnancy jurisprudence by UK courts discussed in Chapter 5 at Section 3.3.5. and *Bhudi supra* at n.111.

<sup>298</sup> See, for example, the dress codes cases *supra* at Section 2.3.3.1.

<sup>299</sup> See, for example, *Waters supra* at n.92 and *Bhudi supra* at n.111.

<sup>300</sup> See for example, *Blaik supra* at n.97, *ex parte Lustig-Prean supra* at n.99 and *Smith v. Gardner Merchant supra* at n.99.

<sup>301</sup> See, for example, *Staffordshire CC supra* at n.107.

There are currently two ways out of this impasse at UK level. The first is illustrated by *Webb No.2*<sup>302</sup> where the House of Lords finally bowed to specific instructions of the ECJ and reinterpreted the comparator requirement in the SDA so as to allow pregnancy discrimination as a non-comparative discrimination right. The second is that ITs seem much less reluctant to take the plunge and enter into preliminary reference dialogue with the ECJ in these areas, as illustrated by the reference in *P v. S* and the recent reference in *Grant v. SW Trains*.<sup>303</sup>

The French courts have engaged in a limited but effective manner in second generation dialogue. Limited because it concerns only night work; effective in the sense that French courts had no qualms about refusing to apply the conflicting national rule. This issue is discussed in more detail in Chapter 6.

### 5.3 Third generation dialogue

This corresponds most closely with Curtin and Mortelman's third generation. From the national court perspective, this entails utilising Community sources to set aside procedural and remedial limits in national law which prevent full enjoyment of a Community equality right. The appellate courts in the UK have been prepared to set aside procedural and remedial limits when a number of conditions have been present. These are (i) that the stakes were not huge (ii) that clear third generation ECJ authority existed permitting them to do so (iii) that an authoritative judgment has made it clear that domestic substantive provisions have prevented enjoyment of a Community equality right and (iv) failure to set aside procedural limits will prevent satisfaction of the right opened up by Community law.<sup>304</sup>

However, when the stakes involved in engaging in third generation dialogue became too great, the appellate courts exploited the subsequent ambiguity and incoherence which emerged in the

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<sup>302</sup> *Webb v. EMO Cargo Ltd (No.2)* [1995] IRLR 645 (HL). See further Chapter 5 at n.106.

<sup>303</sup> *Supra* respectively at n.100 and n.101.

<sup>304</sup> See *supra* Section 2.3.5.2.

ECJ's case-law on third generation remedies<sup>305</sup> and misread the ECJ's second generation case-law to refuse to set aside national procedural and remedial limits.<sup>306</sup>

Once again, it is the non-judicial members at the appellate level and the ITs who were prepared to ask the ECJ to clarify the implications of its second and third generation case-law<sup>307</sup> and certain ITs who were prepared to afford third generation remedies without recourse to the ECJ.<sup>308</sup>

The only example of third generation dialogue in France is the refusal, in all but one of the creche bonus and child care cases, to retroactively limit enjoyment of these benefits.<sup>309</sup> This is not done, as in the UK, by detailed consideration of the ECJ's third generation case law. In response to arguments that male employees could only claim back pay from the date in which the legislative amendments in the light of the condemnation of France in 1988 came into force (10 July 1991) or from the date when the offending clause was removed from the collective agreement, the courts simply responded that, as the provision was previously unequal, employers were bound to pay backpay or state that as it was impossible for male employees to avail of these rights when they should have been able to, non-retroactivity arguments will not be accepted. It is arguable that these cases represent unwitting third generation solutions as the courts are simply not aware that the existence of a Community equality right does not automatically guarantee full retroactive application. It is simplicity, rather than sophistication, which ensures a third generation result.<sup>310</sup>

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<sup>305</sup> See, for example *Johnston(No.2)* and *Steenhorst-Neerings supra* at n.161.

<sup>306</sup> See *Biggs, Setiya, Barber and Preston* discussed *supra* at Section 2.3.5.8.

<sup>307</sup> See *Levez* and *Magorrian supra* at n.189.

<sup>308</sup> For example, the IT in *Marshall(No.2) supra* at n.141.

<sup>309</sup> *Supra* at Section 4.2.

<sup>310</sup> These decisions may also have been influenced by the fact that the time-limits and arrears limits applicable in equal pay and equal treatment cases are much more generous in France than in the UK. Employees have 30 years under Art.2262 of the Civil Code to commence equal pay or equal treatment proceedings. A five year limitation period is placed on actions by employees to obtain backpay (Art.L.143-14 Labour Code). This information is taken from M-T Lanquetin, C. Pettit, C. Sutter, *Les Délais et prescriptions applicables en matière d'égalité de traitement et de rémunération entre les hommes et les femmes: le régime juridique français*, (1990, unpublished paper).



## Chapter 4

# The rest of the landscape: equality strategies and equal opportunities

### 1. Introduction

Having examined the case-law in some detail in Chapter 3, it would be tempting to draw the conclusion that France has a less developed sex equality landscape than either the UK or the EC and leave matters there. However, this would be inadequate, both in terms of *description* and in terms of *explanation*. It would be inadequate as a description as it involves the assumption that the only equality strategies present in equality landscapes must be litigation-based.<sup>1</sup> Rather than making this assumption, we must turn again to the legislative maps set out in Chapter 1 and see what other types of equality strategies are envisaged by the three legislative maps we examined. It would be inadequate as an explanation because it does not help us in trying to understand the *normative dynamics* underlying the development of the equality landscapes in the jurisdictions under review. By ‘normative dynamics’ I mean the relative evaluation of the importance of different types of equality strategy. Using the term ‘dynamics’ underlines that these evaluations do not stand still: they may be reinforced or reversed over time.

Equality specialists have developed two key evaluative phrases by which to judge different types of equality strategy: formal equality and substantive equality. While it is strongly arguable that these concepts may be less solid than we sometimes imagine,<sup>2</sup> there can be no doubting their normative potency. Put simply, characterising an equality decision or strategy as formal is shorthand for saying it is bad or, more accurately, less good than equality decisions or strategies which are characterised as substantive.

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<sup>1</sup> For further investigation as to the inadequacy of this description, see Chapters 5 and 6.

<sup>2</sup> See *infra* this chapter at Section 5.1.3.5 and Chapter 6, Section 6.

This chapter sets itself a very limited remit. First, by developing further the two types of strategies outlined in Chapter 2 - desegregation and re-evaluation strategies - it wishes to investigate how different sub-strands of these strategies have been evaluated in terms of formal and substantive equality in the French and British legislative maps and in their subsequent development. Second, it examines the legislative space given, and the subsequent development of, one type of equality strategy which is generally regarded as not being primarily litigation-based<sup>3</sup> and as the essence of substantive equality: 'equal opportunities' or 'positive action' strategies.

## **2. The topography of equality: desegregation and re-evaluation strategies**

In Chapter 2,<sup>4</sup> a distinction was drawn between legal equality strategies which tackle the process of occupational segregation and those which tackle the results of occupational segregation. Thus, desegregation strategies attribute women's disadvantaged position on the labour market to the fact that women are in the 'bad jobs' on the labour market with the accompanying low levels of training, pay and skills. These strategies aim to move women up and out of these jobs. Re-evaluation strategies see the primary problem which needs addressing as the fact that women are not in intrinsically 'bad jobs' but rather that, due to the gendering of the construction of labour markets, women's jobs are under-valued and they find it difficult to obtain the benefits which accrue from fitting into the 'normal' employee model.

An analogy with a chessboard may be useful in envisaging how the problems and solutions associated with women's disadvantaged occupationally segregated position are viewed. The labour market is the chessboard. Women can be seen as predominantly occupying the black squares and men predominantly occupy the white squares. Black squares currently offer worse terms and conditions of employment than white squares.<sup>5</sup> The overall problem to be addressed is how to improve the disadvantaged occupationally segregated position of women on the labour market. However, in looking at the chessboard, one group argues that the primary problem is that too many women are on the black squares. The solution advocated is to move women onto the

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<sup>3</sup> Though see the discussion of the German situation *infra* at Section 5.1.3.

<sup>4</sup> See Chapter 2 at Section 2.

<sup>5</sup> To utilise the traditional associations of white with good and black with bad, at the risk of appearing racist.

white squares (desegregation).

Another group of people argue that there are two main problems. It is not that the black squares are inherently worth less than the white squares but rather that they are evaluated as being worth less than the white squares. The best move therefore is to improve the position of the black squares. The second main problem is the shape of the chessboard and its squares which suit male patterns of employment rather than female patterns. Alterations need to be made to the board to better suit female employment (re-evaluation). The chessboard rests - and is heavily reliant upon - an almost wholly feminized care table.<sup>6</sup>

Desegregation strategies take two primary recognizable forms in sex equality legislation landscapes. The first are prohibitions on taking sex into account when allocating access to jobs, transfers, promotions, training opportunities etc.. These are normally termed direct discrimination strategies. The second are strategies which involve different forms of allocating women to 'good jobs'. These can range from sex-specific training, encouraging women to apply for 'men's jobs' to various forms of giving women preference to men in allocating jobs. All of the actions which fall under this second form are generally termed 'equal opportunities' or 'positive action' strategies.

Re-evaluation strategies also take two principal forms. Under-valuation is addressed through equal value legislation. Ensuring that the labour market does not prejudice female employment patterns is addressed through indirect discrimination.

This is not to argue, of course, that the current shape of either desegregation or re-evaluation

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<sup>6</sup> While I find this chessboard analogy useful, it is in some respects unsatisfactory. It tends to overestimate horizontal segregation and fails to present vertical segregation adequately. To imagine vertical segregation, we would have to think of the chessboard as three-dimensional with the black squares - where women are crowded - underneath the white squares. It also minimizes the important extent to which other disadvantaged groups - such as people of colour, disabled persons and older workers - are also on the black squares. However, the black squares are also segregated between these various disadvantaged groups. Finally, placing the chessboard on a feminized care table does not adequately capture the actual and mythical relationships between the table and the board. In terms of both reality (how women can participate on the board) and myth (how employers allocate or structure jobs in view of their perceptions of the board and the table) the relationship between market work and care work is much more complex than this model suggests. What is interesting is to see how the courts construct the relationships between care work, market work and the meaning of equality. See *infra* Section 5.1.3.3 of this Chapter and Chapter 5.

strategies in any way adequately realises in practice any of their set goals. It is clear that they do not. However, this does not detract from the fact that, in the development of sex equality landscapes, whatever limited energies the legislature and other employment actors devote to tackling the disadvantaged position of women on the labour market will be likely to place the emphasis more heavily on one of these two strategies. What I wish to do with this classification is to examine descriptively what space is given to these two strategies in the legislative maps and to investigate to what extent normative dynamics help explain the subsequent development of certain features of the equality landscape.

### **3. The weighting of strategies in the legislative maps**

Returning to the maps set out in Chapter 1, it is clear that all of the legislative maps contain mixtures of both strategies. All outlaw direct discrimination, provide for re-evaluation of jobs and leave some space for positive action. Yet, the weighting of the strategies is somewhat different in each of the maps. The British legislative map places equal emphasis on the role of both individual litigation and institutional enforcement. However, both these types of enforcement are circumscribed by the dominance of the principle of symmetry and the correspondingly limited space given to positive action in the map.<sup>7</sup> Hence, both types of enforcement will focus on the first form of desegregation strategy - the prohibition of direct discrimination - and the re-evaluation strategies embodied in indirect discrimination and equal value mechanisms. Of course, whether these strategies are pursued through litigation or formal investigation by the EOC<sup>8</sup> will have an impact on how clearly separated the strategies are kept. Litigation involves a much more precise parcelling of desegregation and re-evaluation strategies into sharply defined separate categories. Enforcement by formal investigation involves a more global analysis of the internal labour market chessboard in a particular firm and hence, the recommendations flowing therefrom will have a greater capacity and tendency to blur the clear lines drawn between direct discrimination, positive action and re-evaluation in the legislative map.

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<sup>7</sup> See Chapter 1 at Section 1.2 and at text accompanying n.22.

<sup>8</sup> See Chapter 1 at Section 1.4.2.

In France, the 1983 law<sup>9</sup> improved upon the definitions and scope of equal value and direct discrimination. There is, however, no clear definition of indirect discrimination in the 1983 law. Hence, re-evaluation strategies are *a priori* limited in scope. The most striking feature of the 1983 law is its strong emphasis on the development of equal opportunities through voluntary measures taken by the social partners.<sup>10</sup> In the large part of the law devoted to delineating these voluntary measures, the principle of symmetry - which is retained for the equal treatment measures - is set aside to emphasise that measures should be taken to improve the disadvantaged position of women. Equal opportunities are not, however, seen as an exception to equal treatment, but rather as the logical corollary of a fuller realisation of the objectives underlying *égalité professionnelle*.

At EC level, the emphasis in the ETD is placed on a symmetrical principle of equal treatment with exceptions to this principle being laid out in the form of genuine occupational qualifications, the pregnancy and maternity exception and an equal opportunities exception. The Agreement on Social Policy, annexed to Protocol 14 of the Maastricht Treaty, introduces a further exception in the field of equal pay for measures which are geared towards compensating women for disadvantages accrued during their employment life.<sup>11</sup>

Thus, our initial observations on the emphases placed on these two strategies in the British and French legislative maps might be as follows. The French map places a stronger emphasis on desegregationalist strategies than on re-evaluation strategies. The strongest reason for this argument is that indirect discrimination is not included in the legislative map. A weaker argument is the emphasis placed on voluntary measures in the legislation geared at realising equal opportunities. This is a weaker argument because there is no reason why these voluntary measures could not equally focus on desegregationalist and re-evaluation measures. The British map, by contrast, places a stronger emphasis on re-evaluation than on desegregation. The strongest argument for this is the limited scope for positive action, backed up by the overriding insistence on the principle of symmetry between men and women. A weaker argument is the emphasis on individual litigation. While it is true that individual litigation will tend to favour re-evaluation

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<sup>9</sup> See Chapter 1 at n.23.

<sup>10</sup> See Chapter 1 at Section 2.1.3.

<sup>11</sup> Art.6(3) Agreement on Social Policy.

strategies in the UK, this is counterbalanced by the equal weighting given in the legislation to enforcement by the EOC, which has more scope to 'mix'n'match' desegregation and re-evaluation strategies. Thus, in the legislative maps, while there is some favouring of one strategy over another, the scope for developing both is clearly present.

#### **4. Development of the maps: explaining the normative dynamics**

This section will argue and try to explain the following conclusions. France has almost exclusively concentrated on desegregation strategies; re-evaluation strategies have disappeared from the equality landscape, although as we noted in Chapter 3, very recently, attempts have been made by certain individuals in France to draw attention to the benefits of litigation-based re-evaluation strategies by drawing on ECJ case-law.<sup>12</sup> In the UK, desegregationalist strategies retain a foothold but re-evaluation strategies occupy a much greater space than they do in the legislative map. Therefore, both jurisdictions have followed the weak tendency of the legislative map to favour a particular strategy, but have intensified this inclination into an almost exclusive emphasis.

Both of these conclusions can be made much more accurate if we consider one further factor. This is well-illustrated by looking at France. To the conclusion that France places its emphasis solely on desegregation strategies, the obvious rejoinder is that it is clear from Chapter 3 that little emphasis has been placed on utilising one important prong of the desegregation strategy: the prohibition on direct discrimination.<sup>13</sup> An important step to refining our description and explanation involves distinguishing between the realisation of equality through litigation and the realisation of equality through other means. The reason why direct discrimination is not seen as very important in France is that there, litigation strategies, whether they be desegregationalist or re-evaluative, are seen as *per se* formal and, hence, it is only other desegregation measures which are defined as substantive. Therefore, the entire focus of the French sex equality landscape is turned towards voluntary desegregation measures. In the UK, for a number of reasons, the exploitation and subversion of the individual litigation model has come to be seen as the principal mechanism for ameliorating the position of women. Hence, the dominant strand of the evaluation

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<sup>12</sup> See Chapter 3 at n.29 and accompanying text.

<sup>13</sup> See Chapter 3 at Section 4.1.

of strategies to ameliorate the disadvantaged position of women in employment in the UK takes place *within* an evaluation of litigation-based strategies. Given that the options within the individual litigation paradigm sharply distinguish between direct discrimination and re-evaluation strategies such as equal value and indirect discrimination, re-evaluation strategies become the dominant focus of *substantive* equality in the UK.

#### **4.1 France: making litigation formal equality and voluntary desegregation substantive equality**

Four sets of materials provide strong support for the hypothesis that, in France, strategies involving litigation have been evaluated as formal and that voluntary desegregation measures have been evaluated as substantive.

The first set of materials are doctrinal evaluations of the law around the time of its introduction. As pointed out earlier,<sup>14</sup> the 1983 law introduced a principle of non-discrimination which covered many more areas of employment life than its predecessor. It also removed the possibility of the employer pleading a 'legitimate motive' for discriminatory acts. It introduced a high level of protection for employees victimised as a result of enforcing anti-discrimination law against employers. It gave much more elaborated guidelines to the courts on how to decide if two jobs were of equal value and attempted to remove a restrictive judicial interpretation of spatial comparisons by providing a new definition. It introduced a partial modification of the burden of proof in equal pay cases. It required employers to draw up an annual equality report and gave the social partners a negotiating space within which to formulate employment equality plans.

Doctrinal evaluations of the 1983 law do not give the same space to these different components of the 1983 law, either quantitatively or qualitatively. The law is discussed as a law of two halves: equal treatment (anti-discrimination and equal pay) and equal opportunities. But these halves are not equal. The equal treatment provisions are always discussed first and in much less detail.<sup>15</sup> They

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<sup>14</sup> See Chapter 1 at n.25 and accompanying text.

<sup>15</sup> For discussions of the law on its introduction see Sutter, 'L'égalité professionnelle dans les droits nouveaux', *Droit Social* (1983) 684; Laufer, 'Égalité professionnelle: principes et pratiques', *Droit Social* (1984) 736; Lanquetin, 'De l'égalité professionnelle entre les femmes et les hommes: A propos d'un projet de loi', *Droit Social* (1983) 238;

are, however, discussed, and some time is spent outlining the case-law under the old provisions and how the new provisions may stimulate more encouraging judicial interpretations.<sup>16</sup> More importantly, they are discussed first because they are seen as the step before the real equality contained in the equal opportunities provisions. Hence, equal treatment and equal pay are defined as formal in contradistinction to the substantive equality offered by the annual equality report and employment equality plans. Thus, Lanquetin states that the new law 's'inscrit également dans une démarche qui, dépassant la vision abstraite de l'égalité, ouvre la voie notamment à des mesures réglementaires ou conventionnelles prises au seul bénéfice des femmes en vue de contribuer à l'égalisation des chances'.<sup>17</sup> Equal treatment provisions are seen as a negative formulation of equality while the annual report and employment equality plans are a positive formulation of equality.

Closely connected to this is the fact that the problem the law is addressing is defined as that of *non-mixité*. The solution is therefore that of achieving *mixité* in the fastest possible way. *Mixité* is given a number of different definitions, but all convey a similar sense. According to Rossi:

la mixité est une situation où l'affectation au travail se fait sans considération liée au sexe; elle suppose une répartition équivalente d'hommes et de femmes dans les différentes emplois, un partage équitable du travail.<sup>18</sup>

The best way of achieving *mixité* (desegregation) is through the equal opportunities measures in the law, in particular employment equality plans. Hence, formal equality is equated with equal treatment. Substantive equality is equated with equal opportunities which, in the French landscape, equates with voluntary employment equality plans aimed at desegregating women's employment. In this way, both litigation and re-evaluation strategies are marginalised. All of these

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Bonnechère, 'Egalité professionnelle entre les femmes et les hommes: réflexion sur les limites du droit', *Droit Ouvrier* (1984) 207.

<sup>16</sup> See, for example, Bonnechère *ibid*.

<sup>17</sup> See similarly Laufer *supra* at n.15 who states at 740, 'Avec la notion d'égalité des chances, un pas supplémentaire est fait pour dépasser le stade des principes en matière d'égalité. dans la loi française ces actions sont définies comme des 'mesures temporaires' prises au seul bénéfice des femmes en vue de contribuer à l'égalisation des chances'.

<sup>18</sup> Rossi, 'Emploi des femmes et mixité: droits et pratiques', *Droit Social* (1987) 155.



strands are neatly expressed by Sutter:

Traduire un principe d'égalité en une formulation négative revient nécessairement à en réduire la portée..Mais la loi ne doit-elle pas aller plus loin et fixer des objectifs à atteindre en termes de mixité des emplois et de mixité des conditions d'emploi, dans l'ensemble des domaines visés à l'art.L123-1? L'interdiction de discrimination selon le sexe, si elle met hommes et femmes en situation d'égalité juridique et formelle, ne saurait à elle seule concourir à la réalisation de l'égalité concrète, c'est-à-dire à la mixité.<sup>19</sup>

The perspective this doctrinal analysis throws on Community equality sources is illuminating. Emphasis is placed on the ETD. The important case-law which had begun to emerge from the ECJ on the interpretation of Art. 119 is generally completely ignored.<sup>20</sup> Moreover, only one provision of the ETD is referred to - Art.2(4). This is referred to in order to establish the provenance of the approach which inspired the French legislature. It is also used to point out that French law goes further down the path of substantive equality than the ETD in that, in the 1983 law the principles of equal treatment and equal opportunities are cumulative whereas in the ETD, equal opportunities are postulated as an exception to the equal treatment principle.<sup>21</sup>

The second set of materials which help to explain the normative dynamics at work in shaping the equality landscape in France are doctrinal comments which have emerged following the first spurt of doctrinal comment accompanying the law's introduction. By and large, these continually reinforce the exclusion of equal treatment-based litigation strategies from the French equality landscape. This is despite the fact that, as we shall see shortly, voluntary desegregation efforts were having little success.<sup>22</sup> The lip-service paid on the law's introduction to the equal treatment provisions of the 1983 law either disappeared or became even more perfunctory in subsequent years. The law *in toto* is assumed to be composed of annual equality reports and equality plans. This makes it possible to measure the law's effectiveness solely on the basis of the number of

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<sup>19</sup> Sutter *supra* at n.15 at 690.

<sup>20</sup> An important exception is found in Lanquetin *supra* at n.15 who, from the outset, attempted to draw parallels between ECJ case-law and developments in France. In a footnote on page 243 she refers to *Jenkins* and asks, 'le principe d'égalité des chances n'appréhende-t-il pas ce que la notion de discrimination indirecte essaye de saisir sur le terrain de l'égalité des droits?'

<sup>21</sup> See Sutter *supra* at n.15 at 687.

<sup>22</sup> *Infra* at Section 5.1.2.1.

plans concluded or to state that the principal characteristic of the 1983 law is the almost complete absence of binding provisions.<sup>23</sup> This makes sense where normative dynamics have evaluated litigation-based equal treatment (including equal pay) measures as formal.

The most explicit formulation of the normative dynamics in the French equality landscape is found in an article by Rossi.<sup>24</sup> For her, the problem is *non-mixité* and the solution is *mixité*. Measures to combat inequality come in two categories: those which tackle primary discrimination (market segregation) and those which tackle secondary discrimination (involving a comparison of the respective situation of men and women with regard to a particular job or post). According to Rossi, the former are better than the latter as they turn systematically to the structure of the whole labour market rather than focussing on individual situations in the same job. The focus should be firmly placed on the terrain of *mixité* and non-litigation based desegregation as secondary discrimination measures are doomed to come up against too many obstacles such as the burden of proof (direct discrimination) or the inoperability of comparisons between different jobs due to judicial reluctance (equal value).

Thirdly, we can look at materials which reflect ministerial or legislative policy in the area of sex equality. Three monographs on the 1983 law have been commissioned over the years by different government ministers responsible for women's rights.<sup>25</sup> One was explicitly commissioned to focus on the plans.<sup>26</sup> The second was commissioned to look at the enterprise and equal opportunities.<sup>27</sup> The opening words of this volume state that the 1983 law provides three incentives for

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<sup>23</sup> See Junter-Loiseau, 'La division sexuelle des emplois à l'épreuve de la loi du 13 juillet 1983 relative à l'égalité professionnelle', *Droit Social* (1987) 143; 'L'égalité professionnelle entre les femmes et les hommes dans l'entreprise: droits et pratiques sociales', *Droit Social* (1990) 109; 'La loi française relative à l'égalité professionnelle: au-delà des apparences', *Nouvelles Questions Féministes* (1995) 67.

<sup>24</sup> *Supra* at n. 18.

<sup>25</sup> For a critical account of the achievements and political vulnerability of the women's rights portfolio see Sineau, 'D'une présidence à l'autre: La politique sociale en direction des femmes (10 mai 1981-10 mai 1991)', *French Politics and Society* (1991) 63.

<sup>26</sup> G. Dioniol-Shaw, A. Junter-Loiseau, V. Genestet, A. Gouzien, A. Larolle, *Les plans d'égalité professionnelle: étude et bilan 1983-1988* (La Documentation Française: Paris, 1989).

<sup>27</sup> J. Laufer, *L'entreprise et l'égalité des chances: enjeux et démarches* (La Documentation Française: Paris, 1992).

management to act on equality issues: the annual equality report, encouragement of social partner negotiation and financial incentives. Hence, equal treatment and litigation have been excluded from the outset. The third was commissioned to investigate the reasons for difficulties in applying the 1983 law and propositions to remedy those difficulties.<sup>28</sup> In this evaluation of the law, the author discusses the CSEP<sup>29</sup> and other institutional structures, the equality reports and the plans. Equal treatment and litigation are catalogued but never discussed.

Finally, we can look at the legislative amendments which have been made to the 1983 law. The principal amendments all fit neatly into an equality landscape where any legislative efforts made will concentrate on improving the desegregationalist aims of the legislation.<sup>30</sup> The most important illustration of this is in the introduction of desegregation contracts (*contrats pour la mixité des emplois*) in 1987 (Art.L.123-1-4). These are aimed at small and medium enterprises and involve a contract between the state, the employer and the woman. The circular accompanying the law explains that the contracts must aim to change the composition of male-dominated jobs (80%) or prepare women for skilled posts linked to new technologies where women are still scarcely represented. The state covers part of the costs of reskilling when a contract is signed. Other amendments have placed further obligations on the social partners to negotiate on equality issues.<sup>31</sup>

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<sup>28</sup> G. Toutain, *L'Emploi au Féminin: pour une méthode de la mixité professionnelle* (La Documentation Française: Paris, 1992).

<sup>29</sup> See further Chapter 2 at Section 5.3.3.

<sup>30</sup> This does not include the important introduction of sexual harassment legislation in 1992, once again by Mme Yvette Roudy presenting a law. The Code pénal was amended by Law No.92-684 of 22 July 1992, JO, 23 July, p.9897; see now Art.L.222-23 which creates a *délit* of 'sexual harassment' and punishes with a fine of 100,000 F or one years' imprisonment the act of 'harassing another'. The Labour Code was amended by Law No.92-1179 of 2 November 1992, JO 4 November 1992, p.15255. See now Art.L.122-46-48 c.trav. and Art.L.123-1 as amended by the 1992 law. The legislation only protects employees from *quid pro quo* sexual harassment by a hierarchical superior. It provides for disciplinary action to be taken against harassers and places an obligation on the employer to take all necessary measures to prevent sexual harassment. The impetus for this legislation was arguably the result of a campaign by a pressure group - the *Association européenne contre les violences faites aux femmes au travail* - on this specific issue. For further details see Roy-Loustaunau, 'Le droit du harcèlement sexuel: un puzzle législatif et des choix novateurs', *Droit Social* (1995) 545 and Moreau, 'A propos de l'abus d'autorité en matière sexuelle', *Droit Social* (1993) 116.

<sup>31</sup> Most notably Law 89-549 of 2 August 1989, now Art.L.123-3-1 c. trav. discussed *supra* in Chapter 1 at n.34 and n.35.

It is hardly surprising in this equality landscape that EC jurisprudence on indirect discrimination and equal pay was, until very recently, ignored or treated as a separate body of law with no consideration of its possible implications in France.<sup>32</sup> It may be that recent attempts to breathe life into the potential of litigation and re-evaluation strategies in France will change the direction of normative dynamics in the French equality landscape.<sup>33</sup>

#### **4.2 UK: privileging re-evaluation through litigation as substantive equality**

As we saw in this Chapter and in Chapter 1,<sup>34</sup> the UK legislative map set out two main avenues for enforcement of sex equality rights. The first was individual enforcement in which the EOC could play a limited role in providing assistance.<sup>35</sup> However, the EOC's central law enforcement role was undoubtedly viewed as that of strategically enforcing law through formal investigations, backed up by their powers to issue non-discrimination notices and pursue persistent discriminators. As Applebey and Ellis state, formal investigations were to be the 'big tanks' while complaints were to be the 'scout cars' of enforcement.<sup>36</sup> As stated above, the parcelling of complaints into individual litigation will tend to demarcate more clearly the lines between desegregation and re-evaluation whilst formal investigations provide a mechanism for blurring the lines and allowing a mixture of equality strategies to be recommended in an overall equality package.

Two important reasons explain the current privileging of re-evaluative litigation strategies in the UK. The first is the failure, for various reasons, of the potential of strategic EOC enforcement by formal investigation to develop to any significant extent. This left the legislative map heavily slanted towards individual litigation. The second concerns the early recognition and subsequent

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<sup>32</sup> See for example Moreau-Bourlès, 'La jurisprudence européenne en matière d'égalité de traitement entre les travailleurs masculins et féminins', *Droit Social* (1989) 541.

<sup>33</sup> See Chapter 3 at n.289 and accompanying text.

<sup>34</sup> See *supra* Section 3 and Chapter 1 at Sections 1.4.1 and 1.4.2.

<sup>35</sup> See Chapter 2 at Section 5.3.3.

<sup>36</sup> Applebey and Ellis, 'Formal Investigations: The Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies', *Public Law* (1984) 236 at 262.

warm embrace in the UK of the potential offered by EC equality laws to permit defects in the national legislative map and unwelcome domestic judicial interpretations to be sidestepped. This permitted the valorisation of litigation strategies in the UK and allowed landmark victories to be achieved before the ECJ and national courts. The EOC's role in both these developments makes it Janus like. On the one hand, it is said to lack the tenacity, conviction and experience to carry out formal investigations and to lack sufficient presence to impinge on the public mind as an adventurous promoter of women's rights.<sup>37</sup> On the other, it is viewed as a courageous pathbreaker, spearheading the 'bold and adventurous strategy of seeking to rely upon Community law to reach the parts which national legislation could not reach on its own.'<sup>38</sup>

#### **4.2.1 The non-development of formal investigations**

The EOC's record on formal investigations has been subjected to detailed and telling criticism. The EOC commenced only nine formal investigations in the first ten years of its existence. The targeting and methodology of these formal investigations have also been subjected to critique. The Commission's failure - both quantitative and qualitative - to produce the goods on formal investigations epitomised in many ways what were seen to be its more general problems. These included a lack of dynamism, focus and adequate planning. Moreover, the conservativeness of its composition led to resources being disproportionately allocated to non-controversial issues.<sup>39</sup> In this respect, from the outset the EOC bore the brunt of unfavourable comparisons with its counterpart, the Commission for Racial Equality (CRE) set up under the Race Relations Act 1976. The CRE, with the advantage of previous experience from its predecessors under the 1965 and 1968 Acts (Race Relations Board), immediately launched an extensive and ambitious programme of formal investigations (commencing 47 in the same period in which the EOC had begun nine).

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<sup>37</sup> In this respect, the British EOC has often been compared unfavourably with both the CRE and the Northern Irish EOC; see for example the discussion in Lovenduski, 'Implementing Equal Opportunities in the 1980's: An Overview', 67 *Public Administration* (1989) 7 at 12ff

<sup>38</sup> Lester, 'Discrimination - What can Lawyers learn from History?', *Public Law* (1994) 224 at 229.

<sup>39</sup> See Sacks, 'The Equal Opportunities Commission - Ten Years On', 49 *Modern Law Review* (1986) 560; Byrne and Lovenduski, 'The Equal Opportunities Commission', 2 *Women's Studies International Quarterly* (1978) 131.

The CRE's experience with its more ambitious formal investigation agenda revealed further obstacles to formal investigations occupying the place assigned to them in sex and race anti-discrimination legislation in the UK. Unless the legislature intervenes, we shall never know whether the mix of powers granted to the Commission's in the strategic enforcement provisions - investigatory powers, judicial powers and enforcement powers - could have worked. This is because the British judiciary could not come to terms with the mix of enforcement powers contained in a formal investigation. In a series of cases,<sup>40</sup> the courts dealt a body blow to the utility of formal investigations as an enforcement mechanism by adding extra limitations and placing obstacles in the way of the exercise of these powers.

According to the courts, the Commission's can carry out two different types of investigation: a general investigation (no allegation of discrimination) or a belief investigation (conduct of named persons suspected by the Commission of unlawful discrimination). A general investigation can be followed up only by non-legally enforceable recommendations, whilst a belief investigation can be followed up with a legally enforceable non-discrimination notice. The courts severely restricted the capacity of the Commission's to alter the scope or type of their investigation if, following its commencement, discrimination (in general investigations) or discrimination of a different type to that originally chosen for investigation (in belief investigations) came to light. The courts stated that a general investigation could never be carried out into a named person. They also increased in two main ways the powers of the investigatee in such investigations. First, they agreed to judicially review the terms of reference of the investigation. Second, they afforded wide-ranging rights of appeal against the facts found by the Commission during a belief investigation on the issuance of a non-discrimination notice at its close. The effect of these decisions is to severely restrict the freedom of action of the Commission's in the conduct of a formal investigation and to provide investigatees with opportunities to prolong the proceedings in legal challenges to each and every aspect of the formal investigation proceedings. Investigatees have taken full advantage of their increased capacity to kill off an investigation by challenging (or threatening to challenge) each step taken by the Commission's.

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<sup>40</sup> See *R. v. CRE ex parte London Borough of Hillingdon* [1982] 3 WLR 159, *R. v. CRE ex parte Amari Plastics* [1982] 2 All ER 499, *R. v. CRE ex parte Prestige plc* [1984] IRLR 335. For a fuller account see Sacks and Maxwell, 'Unnatural Justice for Discriminators', 47 *Modern Law Review* (1984) 334; Appleby and Ellis *supra* at n.36.

Faced with the judicial crippling of their formal investigation powers, the CRE and the EOC travelled down two different roads - dictated by the options available to them. Unlike the EOC, the CRE could not escape these national restrictions through the supranational trap door. Instead, as Coussey has shown, the CRE placed great emphasis on, and devoted substantial resources to, producing and publicising a Code of Practice. Armed with the Code, the CRE then systematically approached large employers to ask them how they were implementing the Code of Practice and carried out research into general awareness of the Code. The CRE has continued to use formal investigations (and the threat of being formally investigated) to negotiate change in particular organisations.<sup>41</sup> Examination of the EOC's Annual Reports indicates the current low priority of formal investigations as part of its law enforcement strategy.<sup>42</sup> In the second decade of the EOC's existence, formal investigations have slipped even further off the enforcement agenda.

#### **4.2.2 The valorisation of re-evaluative litigation strategies**

##### *4.2.2.1 The EC beckons*

Given that positive action is severely restricted in the British sex equality legislative map, that formal investigations seemed unlikely to realise their potential, and that the possibilities for domestic law reform were practically zero, law enforcement strategies in this area had little option but to focus on litigation using the first prong of desegregation strategies (direct discrimination) and the use of re-evaluation strategies in the form of equal value and indirect discrimination. Atkins, commenting on a set of EOC proposals for legislative reform and their faint possibilities of implementation, advised the EOC that in the meantime it 'should make the most of any opportunities for reform afforded by litigation under Community law'.<sup>43</sup>

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<sup>41</sup> Coussey, 'The Effectiveness of Strategic Enforcement of the Race Relations Act 1976' in B. Hepple and E.M. Szyszczak (eds) *Discrimination: The Limits of Law* (Mansell: London, 1992) at 35.

<sup>42</sup> For example the 1995 Annual Report, a special edition to mark 20 years of the EOC's existence, charts the milestones in the EOC's use of law since 1975 (p.33). These are all connected to either litigation or European-induced legal developments in national legislation (for example, on maternity rights). Formal investigations are not mentioned.

<sup>43</sup> Atkins, 'Equal Treatment for Men and Women - The Case for Legislative Reform', *Public Law* (1988) 320 at 328.

This is a telling piece of advice in terms of explaining the normative dynamics of the development of sex equality law in the UK. The drafting of the British sex equality legislation and the institution of the EOC created from 1975 a potential body of equality law specialists. Lester, who helped draft the SDA, was quick to recognise and embrace the potential of the ECJ's ruling in *Defrenne No.2*:

To a Special Adviser to the Home Secretary, who had argued long and hard, and often unsuccessfully, about the scope of the British legislation, its unnecessary exceptions and the manifest inadequacy of its remedies, Community law seemed like a miraculous fairy godmother whose magic wand might after all remove the defects in what had been made so recently in Whitehall and Westminster. This is not what we had been told before we joined the Community. It seemed too good to be true.<sup>44</sup>

The inclusion of both direct and indirect discrimination in the original British legislative map meant that the EC option would be explored to improve on the national legislative map in both these areas. The necessity of introducing an equal value mechanism in order to comply with Community law following infringement proceedings by the European Commission was a potent symbol of the substantive gains to be obtained from exploiting the provisions of EC equality laws.<sup>45</sup> Attacking employment practices which affected women's patterns of employment and the types of jobs that women do through equal value and indirect discrimination came to be seen as the most effective available legal mechanisms for tackling the disadvantaged position of women in the labour market. The procedural and substantive difficulties involved in using the British statutory definitions of equal value and indirect discrimination, compounded by often restrictive domestic judicial interpretations, simply made the need to play the Community law card that much more pressing. The normative dynamics of British sex equality laws have been substantially shaped by considering different ways in which this Community law card can be played - to the extent that the proportion of doctrinal writings on Community law aspects of equality law (and how these can affect domestic law) substantially outweighs purely domestic consideration of sex equality laws. Indeed, purely domestic consideration is difficult to find. Community law, at the doctrinal level, has been fully integrated into the British legislative map. One can no longer be a sex equality lawyer in the UK without being a Community lawyer as well. Tracing sex equality

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<sup>44</sup> Lester *supra* n.38 at 229.

<sup>45</sup> See further Chapter 2 at n.18.



doctrine in the UK primarily involves tracing Community law developments in four specific areas: indirect discrimination, pregnancy, pensions and retirement and procedural and remedies issues. The primary resource materials are Art.177 rulings delivered by the ECJ and judgments by national (mainly UK) courts.

The EOC (and the EOC (NI)) have played a pivotal role in keeping the preliminary reference line to the ECJ open. They have supported approximately one third of the total number of references made to the ECJ on equal pay and the ETD.<sup>46</sup> The EOC continued to support cases even when decisions in the early 80s in cases such as *Worringham, Burton, Jenkins* and *Newstead*<sup>47</sup> made the 'cautious and Delphic utterances of the European Court...troubling and disheartening'.<sup>48</sup> Cases such as *Marshall (No. 1)* and *(No. 2)*, *Bilka*, *Rinner-Kühn*, *Nimz*, *Kowalska*, *Barber*, *Enderby* and *Webb*<sup>49</sup> confirmed that opening the Community door - now arguably irrevocably ajar - had been for the better and not for the worse.<sup>50</sup> During the 80s (and late 70s for equal pay) the EOC had adopted two types of strategy designed to integrate Community law sources: using Community law sources to support a particular interpretation of the EqPA or the SDA and supporting references to the ECJ.<sup>51</sup> In the late 80s and 90s, confident of the increased degree of judicial knowledge of Community sources, the EOC began a strategy of challenging discriminatory national legislation in judicial review proceedings. This brought some notable successes.<sup>52</sup> It also backed a large number of cases aimed at testing various aspects of whether procedural and remedial limits in domestic law were in compliance with Community law.<sup>53</sup> Finally, it lodged a

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<sup>46</sup> See Barnard, 'A Euro-litigation strategy: the case of the EOC' in G. More and J. Shaw (eds) *New Legal Dynamics of the European Union* (OUP: Oxford, 1996) 254.

<sup>47</sup> See Chapter 3 at n.71 (*Worringham, Burton, Newstead*) and n.273 (*Jenkins*).

<sup>48</sup> Lester *supra* at n.38 at 231.

<sup>49</sup> See Chapter 3 at n.71 (*Marshall 1*), n.141 (*Marshall 2*), n.45 (*Bilka*), n.145 (*Rinner-Kühn*), n.147 (*Nimz, Kowalska*), n.103 (*Enderby*), n.156 (*Barber*) and Chapter 5 at n.78, n.99 and Section 5.3.3.6 (*Webb*).

<sup>50</sup> This is, of course, a highly contestable assertion, particularly with respect to *Barber* and its aftermath. However, in terms of a litigation strategy, *Barber* was a 'success' in that it achieved the result that contracted-out occupational pensions were pay within Article 119.

<sup>51</sup> See, for example, the discussion in Chapter 3 at Section 2.2.3.

<sup>52</sup> Discussed in Chapter 3 at Section 2.3.5.4.

<sup>53</sup> Discussed in Chapter 3 at Sections 2.3.5.2 and 2.3.5.8.

complaint with the European Commission asking it to take infringement proceedings against the UK in respect of its equal value procedure.<sup>54</sup> It is important to note, however, that the EOC is by no means the only actor supporting the use of Community law to achieve gains for women on the paid labour market. Unions, law centres and committed individuals (such as Helen Marshall) in particular have played an inestimable role.<sup>55</sup>

#### *4.2.2.2 Connecting EC Impact with Normative Dynamics*

There is of course no necessary direct connection between the use of EC law and the valorisation of re-evaluation strategies. Perhaps because more litigation on equality issues has taken place in the UK than in other Member States, there is a correspondingly less uniform picture of the normative dynamics of equality law. Formal and substantive equality come in many more guises than in the French landscape. To attempt to impose some order on these evaluations, it can be argued that, broadly speaking, formal and substantive have been employed in three quite distinct ways to evaluate the British equality landscape. These can be summarised as evaluating respectively, the legal reach, the theoretical reach and the actual reach of equality mechanisms. These can be viewed as three different ways of evaluating effectiveness.

##### Method 1: evaluating legal reach

This refers to the potential reach a particular equality mechanism could have or does have. For example, an equal value mechanism (substantive) will tend to reach more women than a like work equal pay mechanism (formal). Adopting a non-comparative direct discrimination test (substantive) rather than a comparative discrimination test (formal) for analysing pregnancy will tend to protect more women.<sup>56</sup> Eliminating exceptions in relation to retirement age and pensions will tend to allow more women (and men) to claim the same rights. Eliminating a cap on compensation will allow more discrimination victims to obtain adequate compensation than maintaining one. This evaluation is closely linked to incrementally evaluating the changing *situation in law* and deciding whether the change is likely to be better or worse than the previous

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<sup>54</sup> See Chapter 2 at n 71.

<sup>55</sup> See further Chapter 2 at Section 7.

<sup>56</sup> See further Chapter 5.

position.

### Method 2: evaluating theoretical reach

The second, theoretical reach, is often presented as the difference between an individual model and a group model (or as the contrast between process and results, or as the line between formal and substantive equality). McCrudden neatly summarises these by stating that the individual model aims at cleansing the decision-making process and is concerned with result only insofar as it indicates a flawed process. By focussing on individuals, the individual (or formal) model underestimates the deep structure of gender discrimination. The group (or substantive) model by contrast, fixes on the outcomes of the decision-making process, tends to be redistributive and is concerned with the relative position of groups and classes rather than individuals.<sup>57</sup> McCrudden goes on to identify elements of these models in Community equality laws. He asserts that the individual model is reflected in the symmetrical individual enforcement approach taken to many of the rights in EC equality law whilst the group model is reflected in indirect discrimination developments, and the areas in which Community law has adopted an asymmetrical model: Art.2(3), Art.2(4) and the Court's pregnancy jurisprudence.<sup>58</sup>

### Method 3: evaluating actual reach

The third, actual reach, looks at whether, on the ground, equality laws have had an impact in desegregating the labour market or improving the position of a particular disadvantaged group. Thus, this type of approach will examine the average hourly pay of women before the legislation was introduced and at the time of analysis, compare the amount of women actually protected from dismissal during pregnancy following jurisprudential and legislative changes and compare levels of occupational segregation on the labour market to see if segregation is changing or decreasing

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<sup>57</sup> McCrudden, 'The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements', 13 *Oxford Journal of Legal Studies* (1993) 320.

<sup>58</sup> McCrudden *ibid.* at 328. Of course indirect discrimination can be seen as an extremely limited version of the group model; for an evaluation of different individual and group models see Lacey, 'From Individual to Group' in B. Hepple and E.M. Szyszczak (eds) *Discrimination: The Limits of Law* (Mansell: London, 1992) at 99. See also Lacey, 'Legislation against Sex Discrimination', 14 *Journal of Law and Society* (1987) 114.

in order to evaluate the impact of sex equality laws.<sup>59</sup>

There can be no doubt that this sketch of these methods of evaluation belies the overlapping discussion of them in doctrinal analysis and obscures the fact that the way in which each of the methods is used varies enormously in both sophistication and in the normative evaluations which emerge. Nevertheless, the sketch can help to clarify and advance our thinking on how the normative dynamics in the UK equality landscape have been constructed and developed.

A number of points need to be made about my use of these three methods. First, in the discussion which follows, I will not be examining in great detail the third type of evaluative method. Second, it is clear that both re-evaluative and asymmetrical rights will tend to be defined as substantive in both the first and second methods of evaluation. Third, it is clear that, in many of these areas, a bright line can be drawn between these sketches of formal and substantive and the position in the British legislative maps (and case law) and the position in the EC legislative map (and ECJ jurisprudence). In other words, the EC map - as developed by the ECJ - often appears substantive in relation to the formal approach in the UK legislative map as judicially interpreted. Fourth, symmetrical direct discrimination rights will tend only to be defined as substantive under Method 1 (legal reach). Fifth, where the relative evaluation of the UK and EC positions is not formal (UK) and substantive (EC), but rather formal (UK) and formal (EC), or even substantive (UK) and formal (EC), the result is either complacent ignorance,<sup>60</sup> confusion or fear.<sup>61</sup>

If these points are expanded upon, we may have a deeper understanding of the normative dynamics at work in the UK equality landscape. Let us return to the four areas where EC law has had its greatest impact in the UK: indirect discrimination, pregnancy, pensions and retirement, and

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<sup>59</sup> For a discussion of this type of approach see Hepple, 'Have Twenty-five years of the Race Relations Acts in Britain Been a Failure?' in B. Hepple and E.M. Szyszczak (eds) *Discrimination: The Limits of Law* (Mansell London, 1992) 19.

<sup>60</sup> See further Chapter 6 on night work. This is an illustration of a formal (UK) and formal (EC) situation

<sup>61</sup> The best illustration of this is the *Seymour-Smith* litigation. As we saw in Chapter 3 at n. 146, the Court of Appeal courageously applied both the letter and the spirit of *Rinner-Kühn* to hold that the two year qualifying period for unfair dismissal protection contravened the ETD. The subsequent possible backtrack by the ECJ from its *Rinner-Kühn* position in *Nolle* and *Megner* has placed the future of this important challenge - recently referred by the HL to the ECJ - and the future of indirect discrimination in the UK in jeopardy.

procedural and remedial issues. With regard to indirect discrimination, it is necessary merely to note that the EC level concept of indirect discrimination covers both equal value and indirect discrimination issues in the UK legislative map. Hence all re-evaluative issues in the UK map are evaluated and explored in the context of the ECJ development of the concept of indirect discrimination. Moreover, there can be little doubt that in legal reach (or Method 1) terms, the EC concept has been viewed as superior to UK developments as the reception of *Bilka*, *Rinner-Kühn* and *Enderby* clearly shows.<sup>62</sup> In terms of theoretical reach (Method 2), indirect discrimination will tend to be viewed as substantive in relation to direct discrimination.

The ECJ's treatment of pregnancy, as a non-comparative (assymetrical) direct discrimination right clearly separates it out from its comparative direct discrimination bedfellows.<sup>63</sup> Once again, in a UK context, the ECJ's treatment of pregnancy will be evaluated as substantive in terms of both legal and theoretical reach. With regard to procedures and remedies, removing the statutory cap on discrimination compensation undoubtedly qualifies as substantive in terms of both legal and theoretical reach.

The third area identified, pensions and retirement, is somewhat different. This was used to remove - at least partially - an exception (s.6(4) SDA) from the British legislation, hence allowing for symmetrical rights. Yet its mixed reception in the UK testifies to the fact that while it is substantive in terms of legal reach, it has difficulty establishing its substantive character when evaluated from the perspectives of theoretical and actual reach. The presence of many male litigants (such as Mr Barber, Mr Newstead, Mr Neath) signals that this is a less straightforward area to evaluate positively. It is both an example of the power of using Community law to remove exceptions from national equality laws and of the disadvantageous consequences for women that may flow therefrom. In short, equal pension rights for many women will mean worse pension rights. This example highlights the perverse effects which may emerge from a litigation strategy and the difficulty for any particular institutional litigator (or disadvantaged group) to control the

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<sup>62</sup> But see now the possible change in the ECJ's approach in Chapter 3 at n.154.

<sup>63</sup> See Chapter 5 at Section 3.3.3.

outcome of litigation.<sup>64</sup>

As to areas where the line drawn between Community law and national law is formal-formal or, worse still, formal-substantive, these are challenges which have previously been avoided (night work)<sup>65</sup> or made obsolete by subsequent jurisprudence (for eg, the move from *Jenkins* to *Bilka*). It is arguable that new challenges are emerging for the normative dynamics of the future of the UK's equality landscape. Cases such as *Nolte* and *Megner*<sup>66</sup> have the potential to upset the current formal-substantive balance between the ECJ and the UK, while cases such as *Kalanke* have the potential to constrict future legislative developments in the UK. Having opened the door to the ECJ, the EOC and others fighting to improve the position of women may find, if it ever becomes necessary, that this door will be difficult to close.

## **5. Positive action as substantive equality: different maps, similar results**

The judgment by the ECJ in *Kalanke*<sup>67</sup> continues to resonate throughout the European Community. The Court had never before given judgment, other than obliquely, on the content of Art.2(4) ETD. For the purposes of this thesis, however, what is most interesting about *Kalanke*, the British situation and the French situation is that, despite three legislative maps which diverge considerably in terms of the positioning and space given to positive action measures, the outcome is surprisingly similar. *Kalanke* will not pose a significant threat to any positive action measures currently operating in either France or the UK. The development and space given to so-called 'positive action' measures in the UK and France will be examined first, followed by a more searching analysis of the state of play at Community level.

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<sup>64</sup> Compare Whiteford, 'Occupational pensions and European law: clarity at last?' in T.K. Hervey and D. O'Keeffe (eds) *Sex Equality Law in the European Union* (Wiley: Chichester, 1996) 21 with Fredman, 'The Poverty of Equality: Pensions and the ECJ', 25 *ILJ* (1996) 91. Arguably, the differing evaluations of the ECJ pensions jurisprudence by these two authors stems from the fact that Whiteford's evaluation is carried out in terms of examining coherence and legal reach (Method 1) while Fredman's searching analysis focusses more heavily on evaluation in terms of theoretical and actual reach (Methods 2 and 3).

<sup>65</sup> See Chapter 6.

<sup>66</sup> See Chapter 3 at n.154.

<sup>67</sup> Case C-450/93 *Eckhard Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051.

## 5.1 Convergence: positive action and equal opportunities in France, the UK and the EC

McCrudden has provided a useful typology of the potential range of measures which may fall under the catch-all phrase 'positive action'.<sup>68</sup> These are (1) the eradication of discrimination, or compliance with the anti-discrimination principle, (2) facially neutral but purposefully inclusionary criteria (for example, experience of caring for children at home as a job selection criterion), (3) outreach programmes, designed to attract and fit underrepresented groups for particular jobs either by encouraging applications from those groups or by giving members of those groups the opportunity to obtain skills and qualifications which will assist them in obtaining such jobs, (4) preferential treatment, using membership of the disadvantaged group to select persons at some stage of the employment relationship, where membership of the group is not a job-related qualification and (5) redefining merit, which makes membership of a disadvantaged group a relevant qualification for doing the job in question. This typology can be employed to see which measures are lawful in the UK, France and the EC.

Equally as important, however, are three related issues. First, the techniques and methods envisaged in the legislation for realising any of the above measures must be analysed. Secondly, we need to provide a quantitative and qualitative analysis of positive action measures which have been undertaken. Thirdly, the rationales currently advanced for encouraging the adoption of positive action measures must be examined. It becomes clear that while the positioning and the techniques for realising positive action differ in all three legislative maps, they tend to convergence when the extent of positive action measures, the type of positive action measures and the rationales currently advanced to encourage the adoption of positive action measures is examined.

### 5.1.1 The UK

#### *5.1.1.1 Positive action in the legislative map*

Of the three legislative maps, the UK map provides the most detailed circumscription of which of the positive action measures outlined above will be lawful. Most of the measures in ss.47-49

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<sup>68</sup> McCrudden, 'Rethinking Positive Action', 15 *ILJ* (1986) 219.

SDA concern outreach programmes and the types of outreach programmes which can lawfully be embarked upon are also closely defined. The measures concerning employers and training bodies are set on in ss.47-48.

S.48(1) permits employers to afford access to *training* facilities to employees of one sex to help fit them for particular work and to encourage employees of one sex to take advantage of opportunities for doing that work. Employers are not permitted to carry out sex-specific training for non-employees under s.48. However, s.48(1)(b) allows them to *encourage* non-employees of a specific sex to take advantage of a training scheme or other opportunities for doing a particular type of work. Selection, however, must be on merit. Employers can only utilise the provisions in s.48 when the conditions of underrepresentation laid down in that section are fulfilled. The conditions are that it must reasonably appear to the employer that the particular sex has been underrepresented in that work during the past twelve months.

Employers (and other training bodies) can, however, turn to s.47 if they wish to afford sex-specific access to training to non-employees. S.47 relies on a different definition of underrepresentation to that found in s.48. It must reasonably appear to the employer that, at any time in the last twelve months, no women (or men) were doing that work in Great Britain OR that the number of women doing the work in Great Britain was comparatively small OR that, even if these conditions are not met for the whole of Great Britain, they are met for an area of Great Britain. Until 1986, employers or training bodies who wished to utilise s.47 had to request and receive designation from the Secretary of State. The SDA 1986 removed this requirement.

Finally, s.47(3) allows employers (and other training bodies) to take measures which are not conditional on underrepresentation requirements being fulfilled. This subsection permits an employer to discriminate in affording access to training facilities which would help to fit either employees or non-employees for employment where it reasonably appears to the employer 'that those persons are in special need of training by reason of the period for which they have been discharging domestic or family responsibilities to the exclusion of regular full-time employment'. Clearly, 'domestic or family responsibilities' can cover childcare responsibilities but it can also cover responsibilities towards sick or elderly relatives.



Outside this area of the British legislative map which is directly concerned with defining when positive action will not contravene the anti-discrimination principle, there is one other provision - tucked inside the genuine occupational qualification exceptions in s.7 SDA - which has the potential to be used as a type of positive action measure. This would come under the 'redefining merit' measures in McCrudden's typology. S.7(2)(e) SDA excepts from the application of the SDA situations 'where the job holder provides individuals with personal services promoting their welfare or education, or similar personal services and those services can be most effectively provided by a man (or woman)'.<sup>69</sup>

Hence the British positive action provisions are almost exclusively related to sex-specific training and encouraging women to apply for jobs in which they are underrepresented. Selection for jobs or promotion must be on merit (that is, all preferential treatment is outlawed), and jobs must be open to all, though a particular sex may be encouraged to apply.

#### *5.1.1.2 Techniques and methods of realising positive action*

The most striking feature of the British map is that, apart from the legal duty not to discriminate, no further duties are placed on employers to carry out checks to see if they are in conformity with that duty, or to try to remedy underrepresentation of women in their organisations - or in certain parts or levels of their organisation. The positive action measures in the law are entirely optional; the law is there merely to constrain employers from overstepping the permitted types of positive action measures set out in the legislation.

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<sup>69</sup> This exception must be read in the light of (i) s.7(3) SDA which states that it is not necessary that all of the duties of the job satisfy GOQ criteria; it is sufficient if some of the duties do so and (ii) s.7(4) SDA which states that the GOQ defence does not apply in relation to the filling of a vacancy at a time when the employer already has employees of the relevant sex who are capable of carrying out the necessary duties, whom it would be reasonable to employ on those duties and whose numbers are sufficient to meet the employer's likely requirements in respect of those duties without undue inconvenience. S.7(2)(e) SDA is matched by s.5(2)(d) Race Relations Act 1976 which is, however, restricted to personal services promoting the welfare of persons of a particular racial group. It would appear that more vigorous attempts have been made to use the RRA GOQ than the SDA GOQ. For litigation on the circumstances in which it will apply see *Hughes v. London Borough of Hackney* 7 EOR (1986) 27, *London Borough of Lambeth v. CRE* [1989] IRLR 379; [1990] IRLR 231 (CA), discussed in 27 EOR (1989) 32, *Tottenham Green Under Five's Centre v. Marshall No.2* [1991] IRLR 162, discussed in 37 EOR (1991) 33 and *Greenwich Homeworkers Project v. Mavron* discussed in 37 EOR (1991) 35. Only the latter concerns the SDA GOQ.

Legislative unwillingness to direct employers' activities in this area is also reflected in the restricted remedies which an IT can order following a finding of unlawful discrimination. S.65(1)(c) SDA states that a tribunal may only make a recommendation 'for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination'. This means that tribunals cannot make general recommendations about discriminatory employment practices which became apparent during the course of the litigation. The EAT has frowned upon ITs which have attempted to adopt more innovative remedial solutions.<sup>70</sup>

One way of providing strong incentives for employers to re-examine their employment image and practices along gender or race lines is through the use of contract compliance mechanisms. This means that large scale purchasers (in particular local authorities and other public bodies) can refuse to grant contracts for works or services or refuse to place contractors on a list of approved contractors unless the contractor fulfils a certain number of conditions, which can be related to employment conditions such as health and safety conditions, trade union rights and compliance in various ways with anti-discrimination legislation.

Contract compliance in the UK with respect to gender has been made impossible by the Local Government Act (LGA) 1988. This Act prohibits local authorities (and other specified public bodies) from taking account of 'non-commercial matters' in awarding contracts or drawing up approved lists of contractors. Non-commercial matters include, according to s.17(5)(a), 'the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces'. During the Bill's passage through Parliament, a successful amendment inserted limited possibilities for contract compliance in respect of race relations matters. This allows local authorities to ask a list of approved questions (issued by the Secretary of State for Employment)

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<sup>70</sup> In *Prestcold Ltd v. Irvine* [1980] IRLR 267; [1981] ICR 777 (CA) the tribunal found that a woman was unlawfully discriminated against when her employer did not promote her. The IT recommended (i) that she be seriously considered as the most suitable candidate the next time a suitable vacancy arose (ii) that she should continue to receive the difference in salary until she was promoted to that job or a job of equivalent status. Both the EAT and the Court of Appeal agreed that the IT had no power to make such a recommendation. See also *British Gas plc v. Sharma* [1991] IRLR 101 - ITs have no power to recommend that employers promote those discriminated against to the next suitable vacancy and *Nelson v. Tynes & Wear PTE* [1978] ICR 1183. For more detailed discussion see C. McCrudden, *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff: Dordrecht, 1994) 117-120.

and obtain extremely limited evidence to verify the employer's responses to those questions. Local authorities may also include terms relating to race relations matters into the contract. Arguments to permit an albeit circumscribed form of contract compliance with regard to race were strengthened by the existence of s.71 RRA which requires local authorities to 'make appropriate arrangements' to ensure that they carry out their functions 'with due regard to the need (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity, and good relations, between persons of different racial groups'. The absence of a similar provision in the SDA proved fatal to attempts to insert contract compliance on gender issues into the Bill.<sup>71</sup> The future of the approved questions procedure in the LGA 1988 is itself in doubt as a result of three EC public procurement directives. These directives make no provision for consideration of a contractor's equal opportunities policy in the list of criteria they lay down for public authorities to consider when drawing up approved or 'select' lists of contractors.<sup>72</sup>

The final technique which has had an important effect on the development of equal opportunities or positive action measures in the UK are the Codes of Practice issued by the EOC and the CRE in the mid-80's.<sup>73</sup> These set out what an employer can lawfully do to promote women and ethnic minorities in the workplace and lay down, albeit in a 'soft law' form, what employers should be doing to comply with the spirit and the letter of anti-discrimination legislation. The Codes are admissible as evidence before tribunals. They recommend *inter alia* that employers devise an equal opportunities policy (preferably with the unions), monitor the workforce, set goals and targets to achieve, advertise to encourage underrepresented groups, recruit and select fairly, set

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<sup>71</sup> For an account of the Bill's passage into law see 18 *EOB* (1988) 31; for an analysis of the Act itself see, 'The Local Government Act and contract compliance: an EOB guide', 19 *EOB* (1988) 24. For the difficulties the LGA 1988 presented local authorities who wished to ensure compliance with sex discrimination legislation see *R v. London Borough of Islington ex parte Building Employers' Confederation* [1989] IRLR 382 (Div.Ct.). In this case, the court rejected the argument that the LGA 1988 only outlawed matters which went directly to the composition of the workforce in terms of sex. Therefore the Council had contravened the LGA by requiring contractors to comply with s.6(1)(a) and (c) and (2)(b) SDA.

<sup>72</sup> See further, 'Contract compliance in the 1990s', 54 *EOB* (1994) 11. But see now, the Commission's pledge in the 4th Equality Action Programme COM (95) 381 to 'adapt its own public procurement practices with a view to promoting equal opportunities, by including standard provisions on the necessary respect of the principle of equal pay and equal treatment between men and women' and its intention to 'issue a Communication on the scope for a contract compliance policy under the Community public procurement Directives.'

<sup>73</sup> The EOC Code of Practice was issued under s.56A SDA and brought into effect on 30 April 1985 by the Sex Discrimination Code of Practice (SI 1985/387).

up disciplinary procedures for discriminators, inform employees of equal opportunities in the organisation, set up an equal opportunities committee and train 'positively' using the provisions in the Acts.

#### *5.1.1.3 Equal opportunities and positive action in the UK: quantity and quality*

It is not easy to put together a picture of positive action initiatives in the UK, as initiatives are fragmented, piecemeal and often not maintained over a long period of time. Studies which have been carried out tend naturally to focus on instances of 'good practice' rather than investigate the much larger number of employers who take no active measures to redress imbalances in the workforce. However, a number of remarks can be made.

First, most positive action measures in the UK focus on the first type of measure identified by McCrudden, namely the eradication of discrimination or compliance with the anti-discrimination principle set out in the EqPA and SDA, and in certain forms of encouragement under the 'outreach' (or third type of) measures. We shall focus on these types of measures first before examining to what extent employers engage in positive action 'training' as defined in ss.47-49 SDA. One phenomenon in the UK which may not be reflected in other Member States is that many employers - particularly large organisations - are keen to describe themselves as 'Equal Opportunity employers'. This is reflected in the fact that one third of job advertisements placed in a survey of a quality national newspaper announced that the employer placing the advert was an 'equal opportunities employer', was 'working towards equality' or some similar formulation.<sup>74</sup> It is much more common for public sector employers and voluntary organisations to advertise in this way than private sector employers.

Two informative studies have been carried out to investigate what lies behind this external presentation of organisations as 'equal opportunity employers'. Ball investigated self-designated 'equal opportunity' employers in workplaces where MSF (Manufacturing, Science and Finance) is recognised in London. He found that one quarter of these employers did not even have a written

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<sup>74</sup> 'Advertising Equality', 22 *EOR* (1988) 15. The survey involved scrutinizing all the job adverts in *The Guardian* for one week in 1988. The proportion of 'equal opportunity' employers is likely to have increased since then.

statement of their policy. He concludes that for many employers, the Equal Opportunities label exists to provide a positive external image rather than indicating any willingness to examine, or change, practices within the organisation.<sup>75</sup> The second survey - which followed up those referred to above who had advertised themselves in a national newspaper as equal opportunities employers - is slightly more encouraging. Of the organisations who responded to a follow-up questionnaire, over one third had a detailed, comprehensive policy. However, almost one fifth could only provide a policy statement.<sup>76</sup>

Second, the few innovative policies which have been introduced have shown that an on-going commitment to implementing equal opportunities can make a difference. The most graphic, and renowned, illustration of this is the equal opportunities contract compliance policy pursued by the Greater London Council (GLC) and Inner London Education Authority (ILEA) between 1983 and 1988. These two authorities were the first to adopt contract compliance mechanisms to pursue equal opportunity objectives. The GLC/ILEA requirements were based on the EOC and CRE Codes of Practice and involved drawing up a Programme of Action with the company 'designed to change discriminatory practices within an agreed period of time'. Retention on an approved list of contractors was subject to the programme being carried out in practice and was subject to monitoring by the contract compliance unit. A review of the effectiveness of this contract compliance policy has shown that companies were five times more likely to adopt equal opportunities measures as a result.<sup>77</sup>

Third, even where detailed equal opportunities policies are in place, they are highly unlikely to envisage or engage in 'positive action training' within the meaning of ss.47 and 48 SDA. The GLC/ILEA found that employers subject to contract compliance were most likely to adopt and advertise an equal opportunities policy, set up disciplinary procedures for discriminators and monitor their workforce composition. Employers were least likely to undertake positive action

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<sup>75</sup> C. Ball, *Trade Unions and Equal Opportunities Employers: A Study of London Employers' Equality Policies and Processes based on reports of Union Representatives* (MSF: London Regional Council, 1990).

<sup>76</sup> See *supra* at n.74.

<sup>77</sup> See *Contract compliance: a brief history* (Association of London Authorities: London, 1990) and 'Contract compliance assessed', 31 *EOR* (1990) 26.

training or establish an open promotion system.<sup>78</sup>

Outside the area of contract compliance, Sacks has carried out an extremely useful piece of research investigating when and how ss.47-49 SDA have been used by training bodies, public sector employers and trade unions.<sup>79</sup> With regard to training bodies, she found that the best courses dealt specifically with the actual difficulties experienced by women, had childcare facilities, charged nominal or no fees and provided introductory access training which led women slowly back into education. However, overall the picture was one of lack of resources to provide sufficient high quality training, piecemeal availability and a failure to monitor the courses or students' careers following courses. With regard to public sector employers, the Civil Service provided extremely limited women-only management courses, with its equal opportunities measures geared almost exclusively towards establishing part-time posts, career breaks and childcare. Local authorities, apart from a few honourable exceptions, seemed more interested in schemes which would alleviate employee shortages than in developing the workforce's potential.<sup>80</sup> The training course most frequently offered by local authorities to their female employees was 'assertiveness'. The legality of this is doubtful as it does not seem linked to fitting women for any particular work as required by the SDA. Very little training of the kind envisaged by the Act was offered. Sacks' findings are backed up by a further survey of employer equal opportunities training. This found that those employers who offered EO training had established training in the late 1980s. However the vast majority of training is based on an eradication of discrimination rationale. The most popular type of training is fair recruitment and selection training, followed closely by general equal opportunities training for all staff. Those courses which were sex-specific concentrated on tackling vertical segregation rather than horizontal segregation. Thus, 13% of the employers surveyed offered career development courses for women and 5% offered courses in management training for women.<sup>81</sup>

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<sup>78</sup> *Ibid.*

<sup>79</sup> Sacks, 'Tackling Discrimination Positively in Britain' in B. Hepple and E.M. Szyszczak (eds) *Discrimination: The Limits of Law* (Mansell: London, 1992) 357.

<sup>80</sup> See also Coyle, 'The Limits of Change: Local Government and Equal Opportunities for Women', 67 *Public Administration* (1989) 39.

<sup>81</sup> 'Equality training: an EOR survey of employer provision', 37 *EOR* (1991) 10.

#### *5.1.1.4 Rationales advanced for equal opportunities or positive action*

There has been a strong tendency, particularly in recent years, to sell equal opportunities as 'good for business'. This has become the predominant rationale for introducing equal opportunities. This is exemplified by the 'Opportunity 2000' initiative, the brainchild of an organisation called Business in the Community, which was launched in October 1991 by the Prime Minister John Major as 'a campaign to increase the quality and quantity of women's participation in the workforce'. Companies pay to join 'Opportunity 2000' and agree to put in place goals and actions to achieve change in their organisations. In return they receive assistance in the form of action packs, seminars, newsletters and factsheets.<sup>82</sup> Goals are set by the company itself and 'will be based on its own particular starting point, its specific circumstances and business needs.'<sup>83</sup> Opportunity 2000 commits itself to cultural change in organisations arguing that,

for too long, organisations have regarded equal opportunity initiatives as a financial indulgence, citing the costs, for example, of workplace nurseries. Yet there is mounting evidence that the introduction of 'family-friendly' practices produces real bottom-line benefits.<sup>84</sup>

Around 300 organisations, mostly large private companies, have joined the campaign. There can be no doubt that the campaign has increased the level of 'women-friendly' provisions such as enhanced maternity arrangements, job-sharing and ongoing training for part-time staff. Moreover, most joiners have set targets to increase the number of women in senior management positions in their companies.

The EOC has backed this 'good for business' rationale. It announced that promoting the business case for equal opportunities was a key priority in 1996.<sup>85</sup> The shift of control of the terms of the gender disadvantage agenda from public sector to private companies has been exemplified in the

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<sup>82</sup> And presumably the positive publicity which comes from being a part of the initiative.

<sup>83</sup> Mission Statement, Opportunity 2000.

<sup>84</sup> 'The Business Case for Opportunity 2000', Opportunity 2000 Information Pack.

<sup>85</sup> Kamlesh Bahl, EOC Chair at a conference on the economics of equal opportunities, which focussed on the benefits to businesses of integrating or 'mainstreaming' equality measures into their core policies, see for an account, 'EOC conference backs EO business case', 68 *EOJ* (1996) at 3.

move away from 'equal opportunities' and 'positive action' to 'mainstreaming' and 'managing diversity'. There is some disagreement about what this new 'managing diversity' approach may entail and how to evaluate it but it seems to have clear implications for the evaluation or future potential use of ss.47-49 SDA. The equal opportunities policy adviser for the Institute of Personnel and Development notes:

Managing diversity builds on the learning experiences associated with the development of equal opportunities but challenges some of the ways in which equality programmes and remedies have been traditionally applied. For example, *managing diversity cautions against limiting access to equality provisions to members of particular groups because as well as fuelling resentment among non-group members who might benefit from such provisions, this exclusive practice can serve to further marginalise members of disadvantaged groups and to perpetuate the stereotypes...* It is inevitable that organisations will need to get to grips with [managing diversity] in order to be able to attract and retain the best of all available talent. Unless they can do this they will seriously limit their chances of success in the increasingly competitive and global marketplace.<sup>86</sup>

Disquiet has been expressed, in particular by trade unions, about this undeniable shift in agenda away from 'equal opportunities' towards a 'good for business' rationale and a need to 'manage diversity'. The TUC Women's Conference passed a motion recognising the serious limitations of 'Opportunity 2000'. The Conference noted that 'the failings of this initiative to address the real needs of the mass of women workers, and the central limitation of ignoring the issue of women's pay means the likely benefits of such an initiative will always remain limited to a few highly paid women in each organisation.'<sup>87</sup> Many trade unionists are also wary of the shift towards using diversity, seeing it as just another human resource management tool.<sup>88</sup> It is abundantly clear that the development of the 'equal opportunities' area of the British legislative map is in fact moving away from using even those limited provisions for single sex provision which are permitted by the legislation. Therefore, in terms of legal reach, Art.2(4) ETD, as interpreted by the ECJ in *Kalanke*, certainly does not restrict UK legislation. In terms of actual reach, UK practice at present seems even more timid than that permitted by UK law and Art.2(4). The only equal opportunities practice in the UK which poses a challenge to our understanding of equality is

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<sup>86</sup> Worman, 'Diversity "in", equality "out"', 65 *EOB* (1996) 16. Emphasis added.

<sup>87</sup> 'Whose Opportunity in 2000?', *Labour Research*, November 1993 at 8.

<sup>88</sup> See the comments by Bob Purkiss, national secretary for equalities, TGWU, in 65 *EOB* (1996) 17.



affording very long mother-only leave after birth, and this challenges our understanding in a negative rather than a positive way.<sup>89</sup>

### 5.1.2 France

As the French provisions on positive action occupy the majority of the French legislative map, they have already been discussed in some detail in Chapter 1.<sup>90</sup> It will suffice here to draw attention to a number of features. The French 'positive action' provisions are deliberately asymmetrical - aimed at women only. It is rather difficult to classify the types of positive action permitted by the legislation in terms of McCrudden's typology,<sup>91</sup> as the open-ended nature of the legislative provisions largely leaves decisions on the content of positive action measures to the social partners. However, in sharp contrast to the UK provisions, nothing seems *a priori* excluded. In terms of techniques and methods, the legislation goes significantly beyond merely requiring employers to comply with the anti-discrimination principle and imposes a wide-ranging set of informational requirements. Chief amongst these is the annual equality report which the employer must present to the enterprise committee. The State also offers to share the costs of measures designed to have a significant impact on employment equality. Finally, courts have wide-ranging powers to impose 'positive action' remedies where an employer is found to have been discriminating.<sup>92</sup> The legislative map and, as we have seen, doctrinal analysis<sup>93</sup> therefore pinned all their hopes on equality plans bringing about quantitative and qualitative change in women's position in employment.

#### 5.1.2.1 Positive action in France: qualitative and quantitative analysis

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<sup>89</sup> See *infra* Section 5.1.3.3 and Chapter 5.

<sup>90</sup> See Chapter 1 at Section 2.1.3.

<sup>91</sup> *Supra* at n.68.

<sup>92</sup> See further Chapter 1 at n.28 and accompanying text.

<sup>93</sup> *Supra* at Section 4.1.

Positive action in France constitutes a well-documented failure. Three monographs<sup>94</sup> and a substantial number of articles<sup>95</sup> have provided a wealth of information on the 30 or so employment equality plans which have been introduced since the law came into force. When this figure is compared with governmental predictions of 100 plans in the first year alone,<sup>96</sup> it is starkly evident that the legislative mix of obligations, incentives and negotiating space has not worked. Quantitatively, it has had a statistically insignificant impact. But what motivated those enterprises which did introduce plans to do so and what content did they give to their plans?

Analyses of the motivations for introducing a plan have distinguished between large publicly owned enterprises (some of which were nationalised in 1982 by the Mitterrand administration) and small and medium private sector enterprises (SMEs). In the former, the introduction of a plan was seen by the enterprises as a necessary corollary of their role as standard-setters throughout industry. Dioniol-Shaw *et al.* consider that these enterprises were motivated by a desire to present themselves publicly as 'equality employers' rather than to effect any real, lasting change within their organisations.<sup>97</sup> In the SMEs, the plans were primarily motivated by pragmatic economic considerations. The private sector companies who introduced plans were all confronted by the need to make changes to production and work organisation and employed a large proportion of low-skilled, often manual, female employees. The plans were aimed at utilising this segment of the workforce to adapt to these changes in order to maintain the enterprise's market position. The plans were employer-led and were often designed with limited or zero input from unions and female employees in the enterprises concerned. Negotiation of a plan took two years on average.<sup>98</sup> The sequence of events predicted by the legislature - that the annual equality report would provoke an equality plan - was inverted; the decision to make a plan was generally taken first and this was followed by the drawing up of a report on the situation of female employees in the

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<sup>94</sup> *Supra* at n.26, 27 and 28.

<sup>95</sup> See, for example, Boivin, 'Les plans d'égalité professionnelle en France cinq ans après: constats et réflexions', 4 *Canadian Journal of Women and the Law* (1990) 1 and Junter-Loiseau (1995) *supra* at n.23.

<sup>96</sup> Junter-Loiseau, 'L'égalité professionnelle hors la loi' presented at Conference Le Sexe du Droit du Travail, 27-28 November 1992 (EUI: Florence) 4.

<sup>97</sup> Dioniol-Shaw *et al. supra* at n.26 at 23.

<sup>98</sup> *Ibid.* at 54.

enterprise.<sup>99</sup>

These different motivations for introducing the plans strongly marked their content. Most of the plans included the following areas: hiring and recruitment, career development, pay, working conditions and training.<sup>100</sup> A significant minority also covered the reconciliation of working and family life.<sup>101</sup> However, these areas were very unequally developed in the plans. The nationalised industries, motivated by corporate image rather than economic considerations, produced plans which generally constituted little more than statements of broad principle and good intention in these areas. The SMEs plans, in all but one of these areas, were similarly by and large statements of good intention.<sup>102</sup> The one exception relates to training.<sup>103</sup> SMEs closely linked the content of their plans to their economic constraints and set out their plans as a series of precisely defined 'catch up' training measures for particular groups of female employees. The type of training varied according to the type of enterprise.<sup>104</sup> Some enterprises, where a set of valued jobs were strongly and traditionally 'male', trained a small number of selected women to give them access to these male enclaves. This type of training - normally the acquisition of a recognised qualification: a *Certificat d'Aptitude Professionnel* (CAP) - was geared more towards providing an acceptable 'rite of passage' than providing women with the necessary skills to carry out their new jobs. In most enterprises, the training consisted of the provision of very basic and extremely directed training to a large number of female employees to enable them not to move to new jobs, but to carry out their old jobs better in the context of technological change. Finally, some enterprises trained women to perform jobs which did not yet exist in the enterprise in preparation

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<sup>99</sup> *Ibid.* at 54.

<sup>100</sup> Although some plans covered only training: *ibid.* at 62.

<sup>101</sup> Laufer *supra* at n.27 at 56 found in her study of 22 enterprises that six included this issue in their plans.

<sup>102</sup> For greater detail on the content of the plans see Dioniol-Shaw *et al. supra* at n.26 at 57-74. For a slighter more optimistic perspective on the areas outside training see Laufer *supra* at n.27 at 53-99. Laufer's monograph also includes detailed individual accounts of nine of the plans at 107-301.

<sup>103</sup> Toutain *supra* at n.28 at 42.

<sup>104</sup> Dioniol-Shaw *et al. supra* at n.26 at 63 argue that for the smaller enterprises, the plans represented a method of obtaining funding for 'exceptional' training which they could not otherwise have paid for out of their normal training budget.

for predicted changes, such as increased automisation.

This emphasis on training as the 'cure' for inequality corresponds with the normative dynamics discussed above. It also adds a further dimension to our understanding of these dynamics. In France, training is much more heavily integrated into daily enterprise life than it is in the UK. This makes it a natural and non-threatening way for French employers to introduce 'equality'. Seeing training as the root of the problem permits employers to displace the 'blame' for inequality. Gender inequalities within the enterprise can be attributed to the low level of training women have received before joining the enterprise; hence, it is a societal problem rather than a problem specific to the enterprise's previous or present practices.<sup>105</sup> Furthermore, through the optic of training, the problem is viewed not as the under-valuation of women's jobs but rather, as the low qualifications of women. This is exemplified in one of the plans which states that, 'inequality between men and women in employment is due more to women's unequal access to qualified posts than to unequal pay'.<sup>106</sup>

Finally, despite the fact that the active content of the plans converged around the safe area of sex-specific training, the plans occasionally show refreshing signs of innovation. Thus, the nuclear industry's plan invited plant managers to preferentially hire or promote female candidates where they were of equal competence to male candidates.<sup>107</sup> A private enterprise's plan allocated 2% of its pay roll to improving female pay.<sup>108</sup>

Despite this muted note of optimism, the conclusion must be that in both the UK and France, the development of positive action is unimpressive. Particularly in qualitative terms, it has been weak, unimaginative and prone to the twin perils of tokenism and 'perversion' to meet ends other than that of improving women's position in the labour market.

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<sup>105</sup> See further Dioniol-Shaw *et al. supra* at n.26 at 63-64.

<sup>106</sup> *Ibid.* at 61.

<sup>107</sup> Laufer *supra* n.27 at 268.

<sup>108</sup> Laufer *supra* n.27 at 56.

### 5.1.3 The EC map: What might 'positive action' mean?

What positive action means might be thought to be clear in Community law following the ECJ decision in *Kalanke*<sup>109</sup> where the Court measured up a 'positive action' measure in a Bremen Law on Equal Treatment for Men and Women in the Public Service with the ETD and found that it did not fall within Art.2(4) ETD. The facts of this case are by now infamous. Paragraph 4 of the Bremen law provided that, on the fulfilment of two conditions - the equal qualification of a male and female candidate for a post in the public service and the underrepresentation of women in that particular job category - the female candidate was to be given preference. Women were deemed to be underrepresented for the purposes of the Bremen Law where they comprised less than 50% of the staff in the relevant personnel group within a department. Mr Kalanke and Ms Glissman were both shortlisted for the post of Section Manager in the Parks Department. Following various internal disagreements as to whether the candidates were in fact equally qualified, a Conciliation Board found that both candidates were equally qualified. As the underrepresentation criterion was also fulfilled, the Conciliation Board went on to decide that the post, in application of paragraph 4 of the Bremen Law, should be given to Ms Glissman. Mr Kalanke challenged this decision unsuccessfully before a Labour Court, the State Labour Court and the Federal Labour Court on the grounds that he was better qualified, that in the event of equal qualification he should have been given the post on the grounds of his more onerous domestic financial commitments and finally, that para. 4 of the Bremen law contravened the Bremen Constitution, the Basic Law (the German Constitution) and the German anti-discrimination legislation (Para. 611a German Civil Code). While the Federal Labour Court rejected all these arguments, it felt that the compatibility of the relevant provision in the Bremen Law with the ETD was unclear and made a reference to the ECJ. On 17 October 1995, the ECJ gave a terse and badly reasoned judgment in response to the Federal Labour Court's reference. The breadth of the Court's judgment depends on whether stress is placed on paragraph 22 or paragraph 23 of its judgment. Those who wish to narrowly confine the Court's ruling to the particular facts of this case argue that the former paragraph is the vital one. Here the Court stated:

National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond

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<sup>109</sup> *Supra* at n.67.

promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive.

It is argued that, as most of the state laws<sup>110</sup> contain an 'individual hardship' clause, they are unaffected by *Kalanke* as they do not 'guarantee' absolute and unconditional priority to women.<sup>111</sup>

Others contend that *Kalanke* rules out all discrimination at the point of selection. In other words, it is argued that '*Kalanke* draws a line in the sand between positive action and positive discrimination'.<sup>112</sup> This interpretation of the decision involves reading the judgment in the light of the general thrust of AG Tesaro's opinion in this case and focussing on Paragraph 23 of the Court's judgment where it stated:

Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.

What is clear about this judgment is that it reveals a Court incapable of fulfilling its function of responding adequately and usefully to the national courts because it is riven by internal confusion and dissent. It is to be hoped that clearer thinking and better reasoning will characterise its decision in *Marschall*.<sup>113</sup> Here the ECJ will have to decide whether a law similar to the Bremen law in all respects but for its inclusion of an individual hardship rule is compatible with

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<sup>110</sup> Out of the 14 state laws providing for priority to be given to women when similar conditions were met, only two - the Bremen law and the law of Niedersachsen - do not contain an 'individual hardship' clause. For this information and a cogent argument that *Kalanke* should be narrowly construed see Schiek, 'Positive Action in Community Law', 25 *ILJ* (1996) 239.

<sup>111</sup> The German Federal Labour Court, which made the reference in *Kalanke* has adopted the narrow interpretation of the Court's judgment, *ibid.* at 244. The Commission, on 27 March 1996, also issued an important Communication on the interpretation of *Kalanke* in which it proposes that the narrow interpretation is the better one and puts forward a proposal for a Council Directive to amend Art.2(4) ETD in order to eliminate any potential controversy over the meaning of *Kalanke*. The proposed Directive would re-word Art.2(4) ETD as follows, 'This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect the opportunities of the underrepresented sex in the areas referred to in article 1(1). Possible measures shall include the giving of preference as regards access to employment or promotion, to a member of the underrepresented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case.' The Communication and the Proposed amending Directive are reprinted in 68 *EOR* (1996) 39ff.

<sup>112</sup> Rubenstein, 'Positive discrimination prohibited', 65 *EOR* (1996) 51.

<sup>113</sup> Case C-409/95 *Marschall v. Land Nordrhein-Westfalen* OJ 1996 C 46/11.

Community law. In other words, it should become clearer whether the narrow or the broad interpretation of *Kalanke* is to prevail.

However, what still remains to be done with the *Kalanke* judgment is to situate it in the context of the development of Community sex equality law as a whole. In an important sense, *Kalanke* has laid down a marker which permits us to attempt a global analysis of the evolving normative dynamics of the meaning of 'equality' - and to explore the possible meanings of 'formal' and 'substantive' equality - in Community law. The last piece of the EC sex equality jigsaw has begun to be filled in. As a result, the spatial relationships between the different subsections of Art.2 ETD, and their relationship with the equal pay provisions, can begin to be discerned. No longer can we let Community law 'off the hook' by assuming that Art.2(4) has the potential to compensate for unwelcome or restrictive interpretations in other areas. The normative dynamics in this area can be investigated by tracing the frontiers of positive action in EC law. The most effective way of tracing how the Community views these frontiers is to see how it has dealt with the relationships between various sex equality provisions.

#### *5.1.3.1 Equal treatment, equal pay and positive action*

Whatever doubts may remain about the import of *Kalanke* it does seem clear from this judgment and many others that 'positive action' measures, broadly understood, do not come within the scope of either the principle of equal treatment or equal pay at Community level. These measures are therefore either lawful derogations, unlawful measures or what Prechal terms 'flanking measures'.<sup>114</sup> The latter cover measures which amount to better compliance with an EC equality principle but which are not legally required to comply with that principle. It is important to remember that this interpretation of the equality principle is by no means an inevitable one. In Germany, for example, similar provisions of the Basic Law have been interpreted in a very different way in order to cover the type of measure successfully challenged before the ECJ in *Kalanke*.<sup>115</sup> Moreover, the ECJ itself has shown itself to be capable of construing the equality principle in a more teleological manner in its decisions on indirect discrimination and in its

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<sup>114</sup> Prechal, Case note on *Kalanke* in 33 *Common Market Law Review* (1996) 1245 at 1253.

<sup>115</sup> See *infra* Section 5.1.3.5.

decision in *Dekker* that pregnancy discrimination was direct discrimination within the meaning of the equal treatment principle.<sup>116</sup> This issue shall be returned to in the last section of this chapter.

#### 5.1.3.2 Article 2(4) and positive action

Article 2(4) states that ‘This directive shall be without prejudice to measures to promote equal opportunity between men and women, in particular by removing existing inequalities which affect women’s opportunities’. Given that the Court has stated that positive action must be seen as a derogation from the equality principle,<sup>117</sup> we need to ascertain what content Art.2(4) may have at Community level. This is made difficult because the two ECJ judgments on the scope of Art.2(4), *Commission v. France*<sup>118</sup> and *Kalanke* are characterised by extremely thin and unclear reasoning.

However, there is a strong argument from looking at these two cases and other Community sources, in particular, the 1984 Recommendation on positive action measures,<sup>119</sup> that what is permitted in law at Community level aligns itself quite neatly with what is allowed in UK law and what constitutes French practice. Most ‘positive action’ in the UK does not need to rely on a specific ‘positive action’ exception as it concerns better compliance with the anti-discrimination principle through, for example, monitoring of the workforce, goals and targets and equal opportunities training. The ‘strongest’ version of positive action in the UK legislative map and in French practice has generally involved sex-specific training.<sup>120</sup> Turning back to the EC, in *Commission v. France*,<sup>121</sup> the ECJ rejected the argument that a legislative provision concerning the maintenance of female-specific rights in collective agreements fell within the scope of Art.2(4).

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<sup>116</sup> See further Chapter 5 at Section 3.3.3.

<sup>117</sup> Paragraphs 16 and 17 of ECJ judgment in *Kalanke* Paragraphs 12 and 15 of ECJ judgment in Case 312/86 *Commission v. France* [1988] ECR 6315. See also Paragraph 6, AG Tesaro’s Opinion in *Kalanke*.

<sup>118</sup> *Ibid.*

<sup>119</sup> Council Recommendation of 13 December 1984 on the promotion of positive action for women, Recommendation 84/635/EEC, OJ/L331/34.

<sup>120</sup> See *supra* Sections 5.1.1.3 and 5.1.2.1.

<sup>121</sup> *Supra* at n.117.



The reasoning for this rejection was repeated in *Kalanke*. According to the ECJ, Art.2(4)

is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of equality which may exist in the reality of social life.<sup>122</sup>

It thus permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men.<sup>123</sup>

Furthermore, the Court in the penultimate paragraph of its judgment at least nods towards AG Tesauro's distinction between equality of opportunity and equality of results which the AG correlates with equality with respect to starting points and equality with respect to arrival respectively. If, as the Court says, to need the Art.2(4) derogation two conditions must be fulfilled - first, the measures must be sex-specific and second, the measures must aim to improve the ability of women to compete on the labour market - then the only measures which, at this point in time, clearly fall within the scope of Art.2(4) are sex-specific training measures and outreach measures which encourage women to apply for jobs in which they are underrepresented.

In this respect, the Commission's forceful rearguard action against the *Kalanke* interpretation of the scope of Art.2(4) is not consonant with any previous pronouncements on the scope of positive action at Community level. The key Community source in this area is the 1984 Positive Action Recommendation.<sup>124</sup> Art.4 of this Recommendation outlines the actions which Member States should strive to ensure positive action includes. Each of these actions is wholly compatible with even the broad interpretation of *Kalanke*. Emphasis is placed on vocational training, the encouragement of female candidates in areas where they are underrepresented and the encouragement of supporting measures such as those designed to foster greater sharing of occupational and social responsibilities. At no point is using membership of an underrepresented group as a relevant criterion in selection procedures within employment mentioned as a possible

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<sup>122</sup> Paragraph 15, *Commission v. France* *ibid.* repeated in paragraph 18, *Kalanke*.

<sup>123</sup> Paragraph 19, *Kalanke*.

<sup>124</sup> *Supra* at n.119. For further information on the institutional stances pre- and post-*Kalanke* and its possible impact on various Member States, see *Law Network Newsletter*, Hiver 1996, 28ff.

meaning of positive action.<sup>125</sup>

The remarkable convergence between Community sources and positive action developments in the UK and France is further underlined by the Commission's 1987 Positive Action Guide. This aims to tell employers how to carry out positive action in their workplace and why they should be doing it. In this guide, positive action predominantly entails measures such as monitoring which are designed to ensure better compliance with an anti-discrimination principle. Even more tellingly, positive action is heavily sold as an effective human resource management tool for employers. We are told that, '*everyone* can benefit from positive action. Positive action aims to increase the skills, efficiency, job potential and job satisfaction of all employees.'<sup>126</sup>

#### *5.1.3.3 The equality principle, Article 2(4) ETD, Article 6(3) ASP and positive action*

A further possible meaning of 'positive action' seems to consistently reemerge in both Community and national discourse, although its contours are even less clearly defined than the first meaning discussed above - which focusses on measures to vertically and horizontally desegregate the types of jobs women do. The second meaning given to positive action focusses its attention on the unequal gender distribution of reproductive and care work and the effects this can have on women's participation in, and rewards from, market work.<sup>127</sup> While it is clear that this unequal distribution exists, there appears to be less agreement as to what types of measures are apt to deal with the existence of this unequal distribution and to what extent these measures fall within the ambit of an EC equality principle, one of the so-called 'derogations' from that principle or should be classified as unlawful measures.

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<sup>125</sup> *Positive Action - Equal Opportunities for Women in Employment - A Guide* (CEC) 1987 reproduced in 17 *EOR* (1988) at 33ff. Moreover, the Commission's positive action programme as an employer does not entail the use of sex as a legally binding criterion at any point in the selection procedure. Its second positive action programme (1992-96) encourages but does not require services to prioritise equally qualified female candidates where women are underrepresented in a particular grade or category, see Commission *Kalanke* Communication *supra* at n.111.

<sup>126</sup> See also the Commission *Kalanke* Communication *supra* at n.111 where the Commission reiterates that positive action is 'increasingly recognised to be not only a question of equity but also of efficiency in the management of human resources'.

<sup>127</sup> Referred to here as care/market measures.

An interesting place to start this discussion is with AG Tesouro's opinion in *Kalanke*. The AG sets out three different models of positive action.<sup>128</sup> The first model aims to eliminate the causes of the fewer employment and career opportunities which women have on the employment market by taking action, chiefly, it would seem, in the areas of vocational guidance and training. The third model aims to remedy the persistent effects of historical discrimination by giving preferential treatment to disadvantaged groups, in particular, through the use of goals and quotas. Between these two lies a model which concerns measures designed to foster balance between family and career responsibilities, and a better distribution of responsibilities between the two sexes. This involves measures relating to working time arrangements, development of childcare structures and the return to work of women who have devoted themselves to bringing up their children.

This is all well and good, but it remains unclear why care/market measures would need to find any special justification outside that of providing fuller compliance with the anti-discrimination principles in Art.2(1) ETD or the equal pay principle embodied in Art.119 and the EPD. Legally speaking, sex-neutral care/market measures are only 'positive' in the limited (and questionable) sense that at present the EC equality principle does not *oblige* those charged with complying with the equality principle to introduce such policies.<sup>129</sup> The problem with sex-neutral care/market measures is not that they will ever *infringe* the EC equality principle (or any conceivable formulation of sex equality), but that they do not seem to be *required* in order to satisfy the demands of that principle.

If the AG wished to find a stronger normative home for these types of measures inside the equality principle, we should have seen a heavy-hitting attack in his *Kalanke* opinion on the wholly artificial and unjustified limit which the ECJ has consistently placed on the scope of the EC equality principle. The genesis of this limitation is in *Hofmann*<sup>130</sup> where the ECJ stated that the ETD was not designed to settle questions concerned with family organisation of or to alter the

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<sup>128</sup> Paragraphs 8 and 9 of Opinion

<sup>129</sup> This should not be taken to detract from the possibility that such measures - depending on their content and availability - could very well be 'substantive' measures in terms of both theoretical and, most importantly, actual reach. See further, Chapter 5 at Section 5.3.

<sup>130</sup> Case 184/83 *Hofmann v. Barmer Ersatzkasse* [1984] ECR 3047.

division of responsibility between parents.<sup>131</sup> In *Bilka*, the ECJ was asked whether an undertaking was under a duty to structure its pension scheme in such a way that appropriate account is taken of the special difficulties experienced by employees with family commitments in fulfilling the requirements for an occupational pension. The Court replied that the imposition of an obligation such as that envisaged by the national court in its question went beyond the scope of Art.119 and has no other basis in Community law as it now stands.<sup>132</sup> Yet, AG Tesouro in his *Kalanke* opinion made no reference whatsoever to this limitation of the Court's interpretation of the equality principle in terms of care/market measures.

When we consider further that AG Tesouro saw measures as 'positive' or 'substantive' only when sex-specific measures are taken with regard to a disadvantaged group - here, women - it becomes clear that when he outlined his care/market positive action model, he was actually referring to *female-specific* measures connected to the unequal distribution of care/market work. This is a world away from his initial presentation of what appeared to be a call for re-organisation of working time and the development of childcare structures which would permit a repartition of caring and market roles between male and female parents. So what precisely did he mean?

A clue is given at the beginning of his opinion when he stated that Art.2(4) ETD has a 'substantially similar scope' to Art.6(3) ASP.<sup>133</sup> We will recall that Art.6(3) ASP amends Art.119 to allow Member States to provide for 'specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers'. This similarity in scope is further defined when he considered the rationale for the Art.2(4) derogation, 'the rationale for the preferential treatment [in Art.2(4)] given to women lies in the general situation of disadvantage caused by past discrimination and the existing difficulties caused by playing a dual role'.<sup>134</sup> Given, as we have already seen, that he considered quotas to be both an unlawful and an inadequate way of achieving the objectives of Art.2(4), the emphasis fell

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<sup>131</sup> Reiterated in *Stoeckel* at Paragraph 17 of its judgment. See *infra* Chapter 6 at n.134.

<sup>132</sup> Case 170/84 *Bilka-Kaufhaus GmbH v. Weber von Hartz* [1986] ECR 1607, Paragraphs 42 and 43 of its judgment.

<sup>133</sup> Paragraph 2 of Opinion.

<sup>134</sup> Paragraph 18 of Opinion.

firmly on measures to tackle the 'dual role' as constituting the types of measures apt to fulfil the objectives of Art.2(4).

Unfortunately for the AG, the ECJ decision in *Commission v. France* makes it difficult to argue that female-specific care/market measures fall within the scope of Art.2(4).<sup>135</sup> He attempted to tackle this problem in two ways. First, he argued that the Court was excessively severe in holding that measures of this type fall outwith Art.2(4) and contravene the equality principle.<sup>136</sup> Secondly, he argued that many of the measures which were subject to a general condemnation in *Commission v. France* are, taken individually, compatible with Art.2(4) ETD and/or Art.6(3) ASP. Thus, he argued in relation to *Commission v. France* that some of the French measures, in particular flexible working hours and allowances for nurseries, are definitely discriminatory only in appearance, in so far as they are specifically designed to eliminate the existing obstacles standing in the way of the achievement of equal opportunities.<sup>137</sup> He further maintained that Art.6(3)

may consist at most in allowances for mothers who have to pay nursery charges and relate to other similar contingencies, and [may] certainly not consist of discriminatory measures based on sex which are not designed to remove any obstacle. Once again, therefore, what is being contemplated is the elimination of the unfavourable consequences for women of their specific condition; the objective is still that of attaining an actual situation of equal opportunities for men and women'.<sup>138</sup>

AG Tesouro is not alone in viewing Art.6(3) ASP or other methods of embracing female-specific care/market measures as embodying 'substantive equality'.<sup>139</sup> The Spanish Constitutional Court has held that female-specific creche bonuses are lawful positive action measures rather than

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<sup>135</sup> Discussed above at n 117.

<sup>136</sup> Paragraph 18 of Opinion.

<sup>137</sup> Footnote 14 of Opinion.

<sup>138</sup> Paragraph 21 of Opinion.

<sup>139</sup> See Hepple who states, 'too much attention has been paid by lawyers to the formal right of individuals to equal opportunities and not enough to substantive equality and outcome for disadvantaged groups. Art.6(3)...appeared to point in a new direction' in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds) *European Community Labour Law, Principles and Perspectives. Liber Amicorum Lord Wedderburn*. (Clarendon Press: Oxford, 1996) 237 at 258.

unlawful protective measures given that it was necessary to take into account the clear situation of social inequality in which women with young children find themselves. The measure was compatible with equality because it helped such women to find employment.<sup>140</sup> A special report by the Network of Experts on the import of Art.6(3) also shows some support for AG Tesouro's view.<sup>141</sup> However, most of the national experts are both worried about the loose wording of the provision and sceptical as to its 'substantive equality' pedigree. In the light of the extension to men of creche bonuses by the French courts in the wake of *Commission v. France*,<sup>142</sup> the French experts are particularly virulently opposed to the prospect that Art.6(3) and tendencies to redefine Art.2(4) could reopen the possibility that female-specific care/market measures will be accepted as lawful 'substantive equality' measures.<sup>143</sup>

In my view, the disquiet expressed by those observing attempts to equate positive action and substantive equality with female-specific care/market measures is fully justified. My objections to filling up the content of substantive equality at Community level with female-specific care measures are five-fold. First, many of these measures seem destined to inhibit, rather than facilitate a repartition of care/market work. Second, by giving substantive equality this content, there is a danger that this, particularly in the light of *Kalanke* and the - as yet - untested quantity of Art.6(3) ASP, will become *the* content and that it will become difficult to argue for any other content. Third, it distracts attention from the fact that we should be arguing that sex neutral care/market measures are part and parcel of the obligations involved in implementing an equality principle. Fourth, given the discretionary nature this interpretation of positive action gives us, the problem will as usual be not too many care/market measures but too little, and of the wrong sort. Fifth, the conceptual confusion of those proposing these measures and their failure to provide criteria to separate out the unlawful 'sheep' from the substantive 'lambs' leaves open the danger that there will be inadequate scrutiny of these measures. It is to the issue of scrutiny of female-specific

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<sup>140</sup> S. Prechal and L. Senden, *L'Egalité de traitement après Maastricht: Rapport spécial de 1993 du Réseau d'Experts sur la mise en oeuvre des Directives en matière d'égalité* (CEC DGV: V/653bis/94-FR) at 37.

<sup>141</sup> *Ibid.* In particular from the Greek (*Commission v. France* should not be interpreted too strictly; crèche bonuses could fall under Art.6(3) ASP) and to some extent from the Italian experts.

<sup>142</sup> See Chapter 3 at Section 4.2.

<sup>143</sup> See also Lanquetin, Masse-Dessen, 'Maastricht: consolidation ou remise en cause des principes en matière d'égalité professionnelle', *Droit Social* (1992) 386.

measures by the ECJ that we now turn.

#### *5.1.3.4 The derogations from Article 2(1): degrees of scrutiny*

There are two different ways of thinking about degrees of scrutiny in relation to Arts. 2(2), 2(3) and 2(4) ETD. The first is to say that the discretion of the Member States to adopt such measures, and the degree of scrutiny applied to such measures, should be of the same level of intensity for each of the three subparagraphs in relation to Art.2(1). The second is to say that a decision on the intensity of scrutiny should be made in relation to the dangers in each of the subparagraphs - taken separately - of inequalities against women being perpetuated. From this second perspective, there is a strong argument that lighter scrutiny should be applied to Art.2(4) - understood as measures to vertically and horizontally desegregate the labour market - than to Art.2(2) and Art.2(3). This is because, if Art.2(2) applies, it has the effect of excluding all those of a given sex from performing a particular job. To prevent stereotypical arguments such as physical strength and the capacity to care (or scare) perpetuating and legitimating complete exclusion, strict scrutiny should be applied to Art.2(2). If Art.2(3) - which applies to measures protecting pregnancy and maternity - is given too low a level of scrutiny, there is a risk that individual women may be excluded (with no EC entitlement to full or adequate pay)<sup>144</sup> from the labour market for periods which would be better characterised as parental leave. By contrast, there is little danger that women will risk being excluded from the labour market because of stereotypical assumptions about their capacities as workers because of measures taken to decrease horizontal and vertical segregation of women in the labour market under Art.2(4). This does not mean that no scrutiny need be applied; simply that there are fewer dangers for women in leaving the Member State a greater degree of discretion to implement such measures.

Whether one feels that equivalent scrutiny should be applied to all three 'derogations' or that a decreasing sliding scale of scrutiny should be applied in moving from Art.2(2) to Art.2(4) is, on one level, irrelevant. With the arrival of *Kalanke*, we can justifiably criticise the ECJ for not doing

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<sup>144</sup> Case C-342/93 *Gillespie and others v. Northern Health and Social Services Board and others* [1996] ECR I-475. See Chapter 5 at n.117 and accompanying text.

either. The mantra of *Johnston*,<sup>145</sup> used by both the ECJ and AG Tesauro to justify *Kalanke* - that as a derogation from an individual right, Art.2(4) had to be interpreted strictly - quickly reveals its flawed pedigree when the degree of scrutiny applied in *Johnston* and other Art.2(2) and Art.2(3) cases is examined.

*Johnston* concerned a decision by the Chief Constable of the RUC that male, but not female police officers, would be permitted to carry firearms as part of their regular duties. As a result it was decided not to renew the contracts of female members. The Chief Constable justified the decision by saying that women would be more at risk from assassination than men and that women would be less effective at dealing with families and children if they were armed. The ECJ held that Art.2(2) might in principle allow a wide derogation from the principle of equal treatment since 'in a situation characterised by serious internal disturbances the carrying of firearms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety'. With this broad encouragement, it was left to the national court to work out whether the application of this measure in the context of Northern Ireland satisfied the proportionality principle.

Similarly, in the infringement proceedings taken against France concerning discrimination in the public service,<sup>146</sup> the Court accepted the possibility that there were certain police jobs that women could not be allocated to without demanding more precise information as to what these specific activities might be.<sup>147</sup> Just as telling is the finding in this case that being a head warder could fit within the Art.2(2) derogation, despite the fact that it was accepted that there were no duties which a head warder had to carry out where sex was a determining factor. Rather, the ECJ accepted that 'having regard to the need to provide opportunities for promotion within the corps of warders' the 'extension' of the discrimination authorised by Art.2(2) was justified.<sup>148</sup> It is extremely tempting to substitute the *Kalanke* situation into this dictum in *Commission v. France*

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<sup>145</sup> Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651 at paragraph 38 of the judgment.

<sup>146</sup> *Supra* at n.117.

<sup>147</sup> See Paragraph 23 of the judgment. The Court did however hold that the French system for police recruitment was insufficiently transparent, as no objective criterion governed the percentages of men and women to be recruited.

<sup>148</sup> Paragraph 17 of the judgment.



and ponder the rather different outcome which would have prevailed had it been applied.

If anything, the degree of scrutiny in relation to Art.2(3) is even more lax. The ECJ laid down its markers in *Commission v. Italy* and *Hofmann* and has stuck to them ever since.<sup>149</sup> It would appear from these two cases that once a Member State has called a particular period maternity leave, the ECJ will not question that labelling. The Court in *Hofmann* spelt out the implications of this for Member States' freedom of action in relation to Art.2(3). According to this case, the Member States in relation to Art.2(3) have a discretion as to the social measures which they adopt to guarantee the protection of women in connection with pregnancy and maternity. Moreover, the Member States enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation.

It would seem that while the Court will ensure some degree of consonance between the derogation pleaded and the measure in question - so that, for example, the Chief Constable in the *Johnston* case could not argue that his case fell under Art.2(3)<sup>150</sup> - once it has found its Art.2(2) or Art.2(3) peg, and particularly the latter, the Member State (and the challenged measure) is home and dry.<sup>151</sup>

The contrast with *Kalanke* is stark and revealing. In this case, the ECJ simply asserted that the challenged measure went beyond promoting equal opportunities and therefore overstepped the limits of the Art.2(4) exception, without attempting to test this conclusion against a proportionality requirement, without considering the discretion granted to Member States and without considering the consequences of allowing the measure to stay in place. Yet, allowing the measure to stay in place would simply have had the consequence of permitting this type of action to continue in Germany; it would not have had the effect of placing any obligation on any other Member State to introduce such measures. AG Tesauro made the measure disproportionate by

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<sup>149</sup> Case 163/82 *Commission v. Italy* [1983] ECR 3273; *Hofmann supra* at n.130. See also Chapter 5 at Section 5.3.

<sup>150</sup> See also the ECJ's night work jurisprudence, discussed in Chapter 6.

<sup>151</sup> See further Chapter 5 at Section 5.3. See also Case 165/82 *Commission v. UK* [1983] ECR 3431 (acceptable under Art.2(2) to exclude men from becoming midwives); see also Chapter 3 at n.192.

interpreting Art.2(4) in the following manner. Art.2(4) requires an obstacle against women to be removed by using a temporary measure. Though a specious and entirely unconvincing argument was produced to suggest that it was difficult to know whether these measures are temporary or not (on the assumption that temporary measures must be of a short rather than a long duration), the main emphasis was placed on the argument that no obstacle existed to be removed. Rather, according to the AG, what the Bremen law does is to rebalance the numbers of men and women without removing the obstacles. From this, he concluded that the measure was 'definitely disproportionate in relation to the aim pursued'.<sup>152</sup>

The only conclusion to be drawn from this analysis of the levels of scrutiny applied to Arts.2(2), 2(3) and 2(4) is that it is infelicitous, incoherent and often - for no apparently good reason - goes against the direction suggested by even a rudimentary understanding of the aims of equality legislation. While the development of the degree of scrutiny applied to each derogation - taken individually - may be explicable in terms of the Court playing to different (perceived) audiences at different periods of time, this is an inadequate justification for the rather cavalier manner in which the Court has developed and reasoned the intensity of scrutiny to be applied to the Art.2 derogations.

#### *5.1.3.5 It ain't necessarily so: reanalysing positive action and its relationship with equality*

In my view, the Court's decision in *Kalanke* is wrong. In my view, it is also wrong to consider measures such as those condemned by the Court in *Kalanke* as the essence of substantive equality - in other words to assume that the content of substantive equality (inevitably defined as the only type of equality worth having) is completely - or even importantly - occupied by preferential selection measures. Behind and between these two statements of opinion lies a space for analysing positive action and its relationship with equality.

Behind both these statements is a disagreement with the, at times, facile classification of certain legal provisions as 'formal equality' and others as 'substantive' equality. All sex equality provisions, irrespective of how they are formulated, are *explicitly* directed towards the same

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<sup>152</sup> See, in particular, paragraphs 24 and 25 of Opinion.

end.<sup>153</sup> That end entails arriving at a situation where the labour market chessboard does not disadvantage women (which entails rebuilding the care table too). In other words, all equality provisions are directed towards realising actual equality in the workplace.<sup>154</sup> Therefore, it makes no sense whatsoever to characterise a provision which states 'there shall be no discrimination whatsoever between men and women' (Art.2(1) ETD) or a provision which states that 'men and women shall receive equal pay' (Art.119 EC) as *per se* a 'formal' equality provision. Nor does it make sense to characterise Arts.2(3) and 2(4) ETD or Art.6(3) ASP as *per se* 'substantive' equality provisions. Both the Court in *Kalanke* and those who view positive action as the definition of substantive equality are wrong for the same reason - they sacrifice searching analysis for convenient labels. Moreover - and even more disturbing - these labels can really stick. The consequence of this is that anti-discrimination provisions become synonymous with *de jure* equality and positive action becomes synonymous with *de facto* equality. This makes both the Court and those who argue that substantive equality = positive action postulate a rigid conceptual distinction between the two which does not exist and should not be allowed to persist.

Let us examine first the argument that it is wrong to see *Kalanke* style measures or positive action in general as the essence of substantive equality. We have to ask ourselves 'substantive' in what sense? The experience of the *Frauenquote* (women's quota) challenged in *Kalanke* is that, according to Schiek, they have not proven very effective. She argues that the rise of under 2% of the proportion of women in special underrepresented categories following the introduction of a *Frauenquote* reveals the difficulties of regulating a largely informal career development process through individual decisions. She argues that neither goals and targets nor legally enforceable quotas can be effective in isolation: the one must always accompany the other.<sup>155</sup> Therefore, the argument is not that *Kalanke* style measures should not be part of an overall equality strategy;

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<sup>153</sup> See, for an excellent discussion on this point Charpentier, 'L'arrêt "Kalanke", expression du discours dualiste de l'égalité', 2 *Revue Trimestrielle de Droit Européen* (1996) 281.

<sup>154</sup> That is to say, that the third method of evaluating equality discussed *supra* at Section 4.2.2.2. - its actual reach - must continually be articulated with and inform the other two methods of evaluating equality - legal reach and theoretical reach.

<sup>155</sup> Schiek *supra* at n.110 at 244-245.

simply that we should not place all our eggs in the *Frauenquote* basket.<sup>156</sup> Therefore, even when considering the narrow issue of which measures are most appropriate to desegregate the workforce, a more subtle and articulated analysis is needed than simply attaching the label 'substantive' to anything which looks like a quota. On a broader basis, it is at least as important to use equality to change the shape and evaluation of jobs and to alter the relationship between the care table and the labour market chessboard. There is little point in simply trying to put women into places if we fail to argue *contemporaneously and with similar intensity* that those places must not become devalued as they become femininised (or if) and that many women will find it difficult to retain those places if we do not tackle the unequal burden of reproductive and care work they currently bear. To coldshoulder anti-discrimination rules as *passé* is to allow them to become 'formal' when there is nothing intrinsically formal about them: only about how they are interpreted.<sup>157</sup> The exclusion from the EC equality principle of the relationship between care work and market work is not inevitable. To say that care/market issues are excluded because the EC equality principle is inherently formal is to concede and help to perpetuate a self-fulfilling prophecy.

For similar reasons, it is right to criticise the Court's decision in *Kalanke*. Both the Court and AG Tesouro wrongly take as their starting point a counterposing of an anti-discrimination rule and its derogation. What they should have done instead is examine the labour market chessboard and reexamine the situation in which Ms Glissman and other women in public employment find themselves to see whether the equality rule in the Bremen Law was the most apt to cover this type of situation. In this respect, the work had already been done for them. Benda, an eminent German constitutional lawyer, had found that the number of women in the higher echelons of the public service was not consonant with the number of suitably qualified women in public employment, even when a time lag factor - the usual explanation for underrepresentation - was taken into

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<sup>156</sup> Shaw also argues that *Kalanke*-style quotas are problematic because they raise the possibility that 'qualification' or 'merit' will be manipulated to women's disadvantage and that they presume always that women want to participate in equal or near-equal numbers in a male-defined world, under male-defined conditions: 'Positive Action for Women in Germany: The Use of Legally Binding Quota Systems' in B. Hepple and E.M. Szyssczak (eds) *Discrimination: The Limits of Law* (Mansell: London, 1992) 386 at 394.

<sup>157</sup> Hence, I do agree that a particular interpretation or mode of reasoning may be characterised as formal or substantive. Even here, however, I would argue that greater precision in explaining in what way the particular measure is 'substantive' would facilitate clearer thinking and better strategy formulation in this area.

account. He felt that the equality principle in the German Basic Law, read with other constitutional principles, mandated certain types of *Frauenquote*.<sup>158</sup> This would help to ensure that society's goods and resources were equally shared out. This equal distribution of jobs was not occurring because of structural and social factors. In the case of Ms Glissman, there is even more precise evidence of the nature of these structural and social obstacles. As Schiek notes

But for section 4 paragraph 2 EremLGG Ms Glissman - even if her qualifications had been rated as equal to Mr Kalanke's - would not have been appointed Section Manager, because Mr Kalanke was older, longer in service and 'breadwinner' to three dependants. These practices were, and are, quite common despite never having been laid down in statute.<sup>159</sup>

This makes it difficult to understand or accept two of the pivotal reasons put forward by AG Tesauo for finding the application of the Bremen law disproportionate. The first is his continual emphasis on measures such as these as compensation for *past* discrimination. Yet, it is clear that we are not merely - or even principally - concerned with the past here but with the present and the continuing operation of practices which prevent women reaching higher positions. The second is that he assumes that the only obstacles are obstacles connected with underrepresentation.

But the obstacles are not 'underrepresentation'. Underrepresentation merely indicates that there are obstacles. The obstacles are those with which we are all - including it would be hoped AG Tesauo and the ECJ - familiar from considering indirect discrimination: length of service or seniority requirements, 'breadwinner' assumptions etc...<sup>160</sup> However AG Tesauo seems to have forgotten the basic precepts of indirect or for that matter direct discrimination when he goes on to argue that *Kalanke* type measures are arbitrary because

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<sup>158</sup> A simple recital of some of the provisions of the German Basic Law utilised by Benda to provide a constitutional mandate for *Frauenquote* powerfully illustrates the non-inevitability of the ECJ interpretation of the ETD in *Kalanke*. Art.3 II states 'All men and women shall have equal rights'. Art.3 III states 'No one may be prejudiced or favoured because of his sex.' Art.33 II states 'Civil servants shall be chosen according to 'merit' and without regard *inter alia* to sex.' For this and further information on competing interpretations of the Basic Law in this respect see the account in Shaw *supra* at n.156.

<sup>159</sup> Schiek *supra* at n.110 at 240.

<sup>160</sup> See further the discussion of indirect discrimination in Chapter 3.

it may be observed that underrepresentation of women in a given segment of the employment market, albeit indicative of inequality, is not necessarily attributable to a consummate determination to marginalise women.<sup>161</sup>

It is difficult to see why, if prejudicial animus is not required to prove either a case of direct or indirect discrimination, it should suddenly become necessary in this context.

Looking at the obstacles here is, however, important. This is the point at which positive action (or desegregation) strategies and re-evaluation (or indirect discrimination) strategies meet most closely. Ms Glissman is in a situation where, unless the obstacles are removed or the obstacles are prevented from depriving her of the job, the outcome for her will be the same: she will not get the post. We need then to consider the most apt mix of legal mechanisms to deal with these obstacles.

It seems to me that while it is certainly possible to remove obstacles such as seniority, breadwinner or other gendered cultural assumptions using indirect discrimination, we are in the zone where only a very teleological interpretation of evidence will be sufficient in order to establish that a practice or policy exists with which fewer women can comply. The evidential difficulties present in much discrimination litigation are compounded in the *Kalanke* type situation. This is because we are in the land of unlegislated for, unwritten, unspoken practice. The strength of these practices can be seen in the continuing underrepresentation of women in the public service and the rare public articulation by Mr Kalanke of these practices, provoked by his deeply felt sense of aggrievement. Given the difficulties of using indirect discrimination to tackle these unarticulated, but very effective, exclusionary practices, there is a strong argument that the legal armoury necessary to compose a complete equality principle must be equipped with a legally enforceable right to prevent the obstacles depriving women of jobs they would otherwise obtain. To the argument that this right should only be enforceable when women can detail the obstacles preventing them obtaining the job, it must be replied that this brings us straight back into the problems that led to the conclusion that this type of situation is precisely the point at which indirect discrimination finds it increasingly difficult to operate. Therefore, as a good proxy for these obstacles, underrepresentation and some qualification requirements are chosen. To use underrepresentation in job classes as a proxy for proof of discrimination is scarcely new in

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<sup>161</sup> Paragraph 24 of Opinion.

Community law, as the *Enderby*<sup>162</sup> decision clearly shows. Moreover, the *Kalanke*-type situation is extremely common and becoming increasingly a crucial area on which to focus our attention as more clearly articulated policies or practices are tackled by indirect discrimination. AG Tesouro is unhappy with measures such as the *Frauenquote* because he argues - largely correctly - that they do not remove the obstacles facing women but tend 'merely to rebalance the numbers of men and women'. As equal opportunities is concerned with removing obstacles, rather than effecting equality of results, both he and the Court (para.23) indicate that the *Frauenquote* is incompatible with Art.2(4). But this is to overlook two crucial factors. The first is that there are certain obstacles which indirect discrimination will find it difficult to touch. For these, a combination of goals and targets backed up by legally enforceable selection of women in certain situations is the only way in which these obstacles will not prevent female selection and may cause these obstacles to be confronted. The second is that there is an obstacle which is directly attacked by measures such as the Bremen law. This is the cultural assumption that women cannot belong to the higher echelons; that their rightful place is lower down the internal labour market ladder. Putting women into places has an equality value of its own - we must simply remember that it cannot stand alone.

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<sup>162</sup> *Supra* at n.62.

## **Chapter 5**

### **Pregnancy and Beyond**

#### **1. Introduction**

The pregnant working woman has constituted and continues to constitute a problem case for legislatures, courts, equal treatment law, and feminist jurisprudence. This chapter will subject various models of pregnancy regulation to critical analysis by examining pregnancy, maternity leave and post-birth regulation in the UK, France and the EC.

Previous comparative critiques of the UK model have tended to use the US as a comparator model. More recently, the EC has begun to be used as a comparator model. While these critiques have made vital contributions to our understanding of the complex issues arising in pregnancy regulation, it is arguable that this Anglo-American slant tends to obscure important elements which need to be introduced into the analysis. In particular, both the US and UK systems have been organised around a 'no' or 'low' protection model. This lack of recognition and acceptance of the pregnant working women has brought the fight into the equality or discrimination discourse and important refinements of possible meanings and reformulations of equality have thus been achieved. However, this low or no rights context and its consequent equality focus has had two consequences.

The first is that a discourse shaped in a context where there are scanty rights will produce different normative prescriptions from a context where a low protection-high protection comparison is made. Comparing the UK with France and the EC can help us refine further the question of on what terms we should be demanding further rights. The second consequence is that 'special rights' for pregnant women have constituted, by and large, the alpha and omega of the legal equality-difference employment debate in the Anglo-American world. While pregnancy rights were (quite rightly) fiercely fought for and over, pregnancy and related issues were seen, and largely continue to be seen, as an isolated exception to be strictly contained and kept afloat in a



'formal' equality model. Indeed, the risks of allowing this exception are considered by some to be so great as to suggest the abandonment of the whole enterprise of special pregnancy rights for fear that it may endanger the greater benefits to be reaped from the 'formal equality' strategy.<sup>1</sup> Other commentators have become so disillusioned with the application of equality and discrimination to pregnancy that they have recommended the complete jettisoning of equality, at least in this context.<sup>2</sup> In sharp contrast, in France, landmasses of these 'special rights' are firmly anchored in the social policy landscape and attempts to remove or downgrade them have led to heated battles. Thus, this comparison also provides us with an opportunity to obtain a more polycentric vision of what equality can mean, and to see what we can do with these new reflections on the notion of equality.

## 2. Basic provision

Pregnant employees in the UK, France and within Community law now receive roughly equivalent levels of protection.<sup>3</sup> Thus in all three jurisdictions, the general rule is that it is forbidden to dismiss a pregnant employee regardless of her length of service or the number of hours she works per week. If the pregnant employee is unable to carry out her normal job, the employer must attempt to offer her suitable alternative work. This alternative work can have different terms and conditions but, in the UK, must not be substantially less favourable and, in France, must not lead to any decrease in remuneration. If no suitable work is available, the pregnant employee is suspended, but entitled to her average pay. The right to time off work for ante-natal care is common to all three jurisdictions. Pregnant employees (independent of length of service and hours requirements) have the right to a period of paid maternity leave.

However, this similarity is deceptive for a number of reasons which will be explored in this chapter. Chief amongst these is the recency of, and the reasons for, this apparent equivalence. The

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<sup>1</sup> Most famously propounded by Williams, 'Equality's Riddle: Pregnancy and the Equal Treatment/ Special Treatment Debate', 13 *New York Review of Law and Social Change* (1984/85) 325.

<sup>2</sup> See, for example, Fredman, 'A Difference with Distinction: Pregnancy and Parenthood Reassessed', 110 *Law Quarterly Review* (1994) 106 in particular at 121-122.

<sup>3</sup> The relevant statutory provisions for each jurisdiction are to be found *infra* in Sections 3.3.1 (UK), 3.2 (EC) and 3.5.1 (France).

reason for this broad similarity between the three jurisdictions is the recent addition of the Pregnant Workers' Directive (PD)<sup>4</sup> to the EC corpus of social policy legislation and its subsequent implementation in both France and the UK.<sup>5</sup> However, behind this deceptive similarity, each jurisdiction has its own distinctive mix of rationales, examination of which can give us a greater understanding of the internal logic and limitations of each jurisdiction's regulation of various aspects of pregnancy, childbirth and afterbirth childcare. In France, pregnancy protection and related concerns are firmly placed on the terrain of both employment protection and natalist concerns. The pregnant woman is viewed as a (generally full-time) worker and the law hence aims both to protect her position as a worker and to give her incentives to have more children. At EC level, pregnancy and related concerns have been regulated through two perspectives: gender equality, and health and safety. This may be because these are the two key areas where Community social policy has undoubtedly established its legitimacy. It is when we turn to the UK that the struggle to wrest the traditional rationales from their pre-eminent position becomes very intense. The traditional rationales in the UK are based on voluntarism and business efficiency. The appalling outcome of these rationales in terms of quality and quantity of pregnancy regulation has led to attempts to use equality law - at both national and EC level - to construct more satisfactory protection. Finally, the traditional rationales have had to - at least partly - make way for the new rationale of health and safety enshrined in the PD.

Section 3 examines in greater detail the consequences of the rationales outlined above underpinning pregnancy regulation in each of the three jurisdictions. It concentrates on critically examining the extent to which the particular rationales adopted have shaped legislative, judicial and collective or employer-led responses to the issue of pregnancy regulation. Section 4 argues that the mix of rationales adopted in all three jurisdictions is inadequate. In particular, it is argued that while equality is an inadequate and problematic basis upon which to construct pregnancy regulation, it is also inadequate to jettison equality in the sphere of pregnancy regulation. The

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<sup>4</sup> The Directive's full title is Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ/L348/1 (28.11.92).

<sup>5</sup> In Britain, the Pregnancy Directive was largely implemented in the Trade Union Reform and Employment Rights Act (TURERA) 1993 while in France it was implemented in Loi No.93-121 of 27 January 1993, JO 30 January 1993, 1576.

need to articulate equality rationales with other rationales becomes even clearer in Section 5 when regulation of the post-birth period in the UK, at EC level and in France is examined.

### **3. Examination of the rationales**

#### **3.1 The UK: voluntarist and business efficiency rationales**

In the UK, the implementation of even the drastically diluted PD<sup>6</sup> radically altered the coverage of the pregnancy and maternity regime. To understand why this is the case, we need to examine the situation in the UK both before and after implementation of the PD in 1993. Before this date, legislation regulating the pregnant employee - introduced principally in the Employment Protection Act 1975 and the Employment Act 1980 - reflected two rationales at work in dictating the scope and content of the legislation: business efficiency and voluntarism.

The business efficiency rationale does not view employment protection rights as an automatic entitlement: rather, protection of employment should be reserved for 'deserving' employees who have proved their worth on the labour market. While there is a presumption in favour of making generalised assertions about who these employees may be, these presumptions in favour of protection may be rebutted by evidence that, in a particular case, either the interests of the business outweigh the employee's deserts or that the employee has forfeited her privileges as a 'deserving' employee by failing to comply with the requirements necessary to retain those privileges. Moreover, within the business efficiency rationale, of those employees who cross the minimum threshold to obtain a presumption of protection, some are more deserving than others - principally on the ground that their skills are more useful to the employer than the skills of other employees. Therefore, the business efficiency rationale is not merely consonant with differing levels of protection for pregnant employees - it positively demands it.

The rationale of voluntarism is one with which all observers of British industrial relations are familiar. Broadly speaking, it reflects a preference for leaving regulation of aspects of the

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<sup>6</sup> For further information on the watering down of the provisions in the PD during its legislative passage, see *infra* Section 3.2.1.

employment relationship as much as possible to collective bargaining rather than to legislation. The British maternity provisions have been characterised as having a “form” [which] embodies a masculine conception of work’ in that the maternity provisions are designed to favour a full-time, long-term unionised employee.<sup>7</sup> This refers to the hours and service requirements and the conceptualisation of all the EP(C)A rights (including maternity provisions) as a ‘floor of rights’ upon which voluntary collective bargaining (the preferable method for regulating employee rights) was expected to build. The voluntarist rationale informing the ‘floor of rights’ mode of regulation dovetails neatly with business efficiency in that it too was certainly not designed to provide *uniform rights* for all pregnant employees. Rather, the level of pregnancy protection was designed to be a function of their industrial strength and collective bargaining muscle. Thus, from its inception, it tended to give inadequate pregnancy and maternity protection to those without access to effective collective bargaining on this issue.

The effect of these two rationales can be seen in three key areas: the organisation of the legislative regime, judicial interpretations of the legislation, and the extent to which employers and the collective bargaining partners have supplemented the legislative ‘floor of rights’.

### **3.1.1 The legislation**

Following the implementation of the PD in the UK, both the old (pre-PD) and the new (post-PD) statutory models sit alongside each other. Hence, the old model has not disappeared; it has merely been substituted in part by the new model which is designed to comply with the PD. In order to see how the legislation works, it is proposed to examine how the old and new models protect the pregnant worker against the various problems she may encounter on the labour market.

The pregnant job applicant receives no protection from either the old or new models. This reflects the business efficiency rationale and the minimalist approach to implementation of the PD in UK legislation. Hence, protection of the pregnant woman when hiring decisions are made - an issue not covered by the PD - remains an issue subject to the vagaries of national and supranational

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<sup>7</sup> Conaghan and Chudleigh, ‘Women in Confinement: Can Labour Law Deliver the Goods?’, 14 *Journal of Social and Welfare Law* (1987) 133 at 137-139.

court pronouncements on the scope of equality.<sup>8</sup>

Under the old model,<sup>9</sup> dismissal for pregnancy was treated as unfair. However, this protection was only available to employees with two years continuous service. Furthermore, this general principle was subject to two exceptions which made pregnancy-related dismissals potentially fair. The first exception arose if the woman was (or would have become, due to pregnancy) incapable of adequately doing the work she was employed to do. The second covered the situation where, because of her pregnancy, she could not or would not have been able to carry out her job without contravening a health and safety duty or restriction and no suitable vacancy was available. These stringent requirements to qualify for legislative protection meant that a huge number of women were deprived of any protection from being dismissed when pregnant. Until implementation of the PD, access to the most basic rights protecting the employment position of the pregnant employee was conditional on the amount of time spent in the enterprise. Following implementation of the PD, no qualifying period of service is necessary to claim unfair dismissal<sup>10</sup> and the two exceptions have been removed. Any pregnant employee who is dismissed is now regarded as unfairly dismissed she is dismissed because 'she is pregnant or [for] any other reason connected with her pregnancy'. The new model retains a right to paid time off work for ante-natal care.<sup>11</sup>

Maternity leave raises a host of issues: qualification for protection, the scope of protection and remedies in the event of an employer's failure to provide the protection. It is important to understand the old regime - not merely because it reveals the attachment of the UK legislation to the two rationales outlined above - but in order to understand the different tiers of protection in the current legislative framework, which involves the juxtaposition of the old and new models. The new model is now termed in the legislation general maternity leave, whilst the old model involves extended leave with a right to return.

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<sup>8</sup> See *infra* Section 3.3. Discrimination in hiring was explicitly outlawed by the original Commission Equality Unit PD proposal but later dropped out of the text - see *infra* Section 3.2.

<sup>9</sup> See s.60 EP(C)A 1978.

<sup>10</sup> See s.99 ERA 1996.

<sup>11</sup> See ss.55-57 ERA 1996.

In order to qualify for old model protection, an employee needs two years service.<sup>12</sup> This is unnecessary for the new model entitlement to general maternity leave.<sup>13</sup> In order to obtain leave entitlement under either model, women must fulfill certain notification requirements. For both models, this requires informing the employer in writing at least 21 days before the date on which she intends the maternity leave absence to begin. If this is not possible, the pregnant employee must notify the employer as soon as is reasonably practicable.<sup>14</sup> To exercise the option of extended leave and a right to return available for those who qualify for old model protection, further notification requirements must be fulfilled. When fulfilling the general notification requirements, the employee must also inform the employer that she intends to exercise her right to return.<sup>15</sup> She is also obliged to reply to the employer's request for written confirmation that she intends to exercise the old model rights.<sup>16</sup> In order to exercise her right to return, she must, while on leave, notify the employer 21 days in advance of her anticipated return to work.<sup>17</sup> Failure by employees on either general maternity leave or old model leave to fulfil these requirements entails the forfeit of protection from the legislation once the employee has left work. In other words, the employee would have no claim under the maternity protection provisions of the ERA against an employer who did not permit her to return to work.

When looking at the scope of protection, the different rationales underlying the old model become very clear. Under the old model, the contract of employment has at best a presumption of subsistence during the leave period.<sup>18</sup> Hence a woman on leave is not entitled to the benefit of any of her terms and conditions of employment while she is on leave. It merely permits - if a woman fulfills all the service and notification requirements - the preservation of the rights she had before

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<sup>12</sup> Counted at the eleventh week before the expected date of confinement; see now the old model in s.79 ERA 1996.

<sup>13</sup> See s.71 ERA 1996.

<sup>14</sup> See ss.74-75 ERA 1996.

<sup>15</sup> See s.80(1) ERA 1996.

<sup>16</sup> See s.80(2) ERA 1996.

<sup>17</sup> See s.82 ERA 1996.

<sup>18</sup> See *infra* Section 3.1.2.

she went on leave. The period of leave will not be counted - either positively or negatively - if she manages to preserve the contract by fulfilling the requisite conditions. The old model gives women a potential period of 40 weeks leave - eleven weeks before childbirth and 29 weeks afterwards - within which she may exercise a right to return to work and preserve her contract.<sup>19</sup>

The new model regards the contract as continuing to subsist during the general maternity leave period.<sup>20</sup> Hence, women who have properly notified that they are on leave continue to benefit from their terms and conditions and continue to accrue rights during this period. Failure by the employer to accrue a woman's contractual benefits during the general maternity leave period will constitute a breach of contract - allowing a woman to sue for contractual damages in the County Court. The new model grants women fourteen weeks leave.<sup>21</sup> Hence, women with two years' service who wish to utilise the longer leave provisions in the old model will now have fourteen weeks in which their contractual rights accrue, and a further period (of potentially 26 weeks) in which their rights are merely preserved. Under both models, preservation, but not accrual, may occur for a further four weeks following the end of the given leave, if a woman presents a medical certificate to the employer covering the four week period.<sup>22</sup>

Very importantly, neither the old model nor the new model allow for payment of wages or salary during the leave period. This makes sense under the old model as none of the rights under the contract continue to accrue during the leave period. It is specifically excluded under the new model as the one term which the employee cannot benefit from under the contract during the period of general maternity leave.<sup>23</sup> It is the crucial issue of the maintenance of income during the period of maternity leave which highlights most effectively the continuing attachment of the UK to a tiered and incomplete system of protection for the pregnant employee. This is reflected in the

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<sup>19</sup> See s.79 ERA 1996.

<sup>20</sup> See s.71(1) ERA 1996. See further, 'Trade Union Reform and Employment Rights Act and equal opportunities: The EOR guide', 50 *EOR* (1993) 24ff.

<sup>21</sup> See s.73 ERA 1996.

<sup>22</sup> See s.82(3), s.82(4) ERA 1996 (old model), s.99(3) ERA 1996 (new model).

<sup>23</sup> See s.71(2) ERA 1996 which states that the general right to accrual of contractual benefits during the fourteen week leave period 'does not confer any entitlement to remuneration'. There can be little doubt that the boundaries between remuneration and other contractual benefits will be difficult to draw.

view expressed by the government in 1986 that maternity pay is 'a form of reward for continuous service with one employer for a number of years'.<sup>24</sup>

Prior to PD implementation, employees with two years' service received six weeks higher rate Statutory Maternity Pay (SMP) - fixed at 9/10 of the employee's weekly wage and twelve weeks lower rate SMP (worth less than Statutory Sick Pay). Employees with six months' service fifteen weeks before the expected date of confinement received eighteen weeks of lower rate SMP. All other pregnant employees who failed to qualify for any SMP retained a residual entitlement to Statutory Maternity Allowance (SMA - worth less than lower rate SMP) paid by the Department of Social Security. In order to qualify for any SMP the employee had to have been earning more than the lower limit of National Insurance (NI) contributions. Before PD implementation lower rate SMP was £48.80 pw and SMA was set at £44.55 pw. McRae's survey of the old model of maternity rights in Britain found that 20% of women in work during pregnancy in her sample received no maternity pay and 50% of women in unskilled jobs received no payment from any source.<sup>25</sup>

The new provisions, introduced to comply with the PD, improve the situation somewhat.<sup>26</sup> While still dependent on service and earnings requirements, more women will now be in a position to fulfil them. Now, any woman who is employed continuously in the same job for 26 weeks before the week immediately preceding the fourteenth week before the expected birth date will be entitled to SMP for eighteen weeks provided she earns above the NI threshold<sup>27</sup> and fulfils the requisite notification requirements. All women who qualify will receive 90% of their earnings for the first six weeks and a standard rate of SMP for the remaining twelve which is now set at the level of Statutory Sick Pay (SSP).<sup>28</sup> Women who do not qualify for SMP may qualify for eighteen

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<sup>24</sup> DHSS, *Reform of Social Security: Volume Two* (1985) Cmnd. 9518, paragraph 5.22, cited in Conaghan and Chudleigh *supra* at n.7.

<sup>25</sup> S. McRae, *Maternity Rights in Britain: The PSI Report on the Experience of Women and Employers* (Policy Studies Institute: London, 1991) xxxi.

<sup>26</sup> The new provisions were introduced in the Maternity Allowance and Statutory Maternity Pay Regulations 1994 (SI 1994/1230) which amend the old provisions in the Social Security Contributions and Benefits Act (SSCBA) 1992.

<sup>27</sup> £61 per week as of April 1996.

<sup>28</sup> See s.166 SSCBA 1992. This is currently £54.55 from April 1996 as laid down by SI 1996/559 art.10.



weeks SMA if they have paid at least 26 weeks of NI contributions in the 66 weeks before the baby is born. SMA is increased to SSP levels for women in employment when they claim; it remains at less than SSP levels for those who are self-employed or recently unemployed. SMP is paid by the employer who may then recoup part or all of the payments made by deducting sums paid from contributions payments.<sup>29</sup> It is clear that provision of income for the employee on maternity leave continues to be intimately linked with concern for employer costs and time spent in the enterprise rather than focusing on the costs for the employee who is on maternity leave.

The principal remedy for women who qualify under either the old or new model for protection is a finding of unfair dismissal when the employer fails to afford that protection. Although unfair dismissal, in theory, sets out reinstatement and re-engagement as the principal remedies,<sup>30</sup> in practice these are rarely awarded.<sup>31</sup> Successful claims of unfair dismissal generally lead to the awarding of a basic award and a compensatory award. The latter is subject to a cap, currently fixed at £11,300.<sup>32</sup> Therefore, dismissal for pregnancy under both the old and new UK legislative regimes is likely to lead, at best, to an ungenerous award of monetary compensation. Moreover, employers can, in certain situations, avoid taking back women who have opted for the extended period of leave under the old model. Failure to permit an employee to exercise her right to return is not treated as dismissal on that ground if the employer employs less than five people, if it is not reasonably practicable for the employer - for a reason other than redundancy - to allow her to exercise her right to return or for suitable, alternative employment to be offered to her, or where

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<sup>29</sup> See s.167 SCCBA 1992. Only small employers (as defined in the Act) can recoup the full amount paid out as SMP. All other employers can recoup 92% of SMP payments made. Placing the obligation to pay, and subsequently recoup, SMP on the employer undoubtedly increases the employer's perception of being placed under a burden and increases the possibility of abuse.

<sup>30</sup> See s.112 ERA 1996.

<sup>31</sup> Although there would appear to be an argument that the new right to general maternity leave in s.71 ERA - because it is premised on the continuing accrual of rights under the contract - could be invoked to ask for injunctive relief under the contract. While injunctive relief is more likely to ensure that the employee retains her job (because she has not elected to accept the employer's repudiation), the cases in which the courts have so far been willing to grant injunctive relief under the contract of employment have generally involved breach of a disciplinary procedure expressly inserted into the contract. An employee dismissed while on maternity would be more likely to be relying on an implied term, such as that of good faith. In these circumstances, it is difficult to say with any certainty that the employee would have a realistic chance of obtaining injunctive relief.

<sup>32</sup> See s.124(1) ERA 1996.

she is offered and refuses suitable alternative employment.<sup>33</sup>

It is thus clear that, even following implementation of the PD, UK law still 'bestows its favours on a selected few.'<sup>34</sup> The few is a considerably greater number of women following the implementation of the PD into UK law, but the rationale of the UK legislation continues to be one where the quality of maternity protection is - in many important respects - commensurate with the employee's participation and occupational status in the paid labour market and their good behaviour in complying with the requirements necessary to obtain the protections available.

### **3.1.2 Judicial interpretation of maternity rights: fragile rights, managerial prerogative and the contract**

While the British courts lamented the complexity of the old statutory model,<sup>35</sup> their sympathy with those attempting to navigate their way through these provisions very rarely extended to interpreting the old model in such a way as to help an employee who had stumbled over one of the many available technicalities. Instead, if anything, the already minimal protection was generally interpreted by the courts in such a way as to exclude employees who had - in the slightest detail - deviated from the tortuous path dictated by statute.

Many of the problems have arisen from attempting to work out the relationship between the general statutory right not to be unfairly dismissed and the special right not to be unfairly dismissed while trying to return from maternity leave. Further problems have arisen from the court's fumbling for an apt method of categorising the relationship between maternity leave and the right to return, on the one hand, and the contract of employment on the other. Appellate cases on pregnancy and maternity rights post-PD have only now begun to emerge. Therefore, the

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<sup>33</sup> Sec s.96 ERA 1996.

<sup>34</sup> Ellis, 'Analysis: Discrimination on the ground of Pregnancy in EEC law', *Public Law* (1991) 159.

<sup>35</sup> Many of the cases cite with approval Browne-Wilkinson J's comments in *Lavery v. Plessey Telecommunications Ltd* [1982] IRLR 180 at 182, 'These statutory provisions are of inordinate complexity exceeding the worst excesses of a taxing statute: we find that especially regrettable bearing in mind that they are regulating the everyday rights of ordinary employers and employees. We feel no confidence that, even with the assistance of detailed arguments from skilled advocates, we have now correctly understood them. Doing the best we can with this unpromising material, the position seems to be as follows..'.

analysis here is largely confined to the old model.

One proposition which clearly emerges from the cases is that women who have failed to comply with any of the technicalities in relation to notification requirements - whether originating in the statutory scheme or a contractual scheme - lose their special maternity unfair dismissal rights. For example, in *Lavery v. Plessey Telecommunications*, a woman who gave notice later than she should have of her intention to return to work lost her right to claim unfair dismissal under the maternity heading.<sup>36</sup> The courts show little sympathy for the woman who slips up on a technicality. These cases view maternity rights as a privilege to be given only to those who deserve them by jumping through all the right hoops at the right times. There is no space in this type of analysis for recognition of the fact that some women who are pregnant and give birth may be too exhausted, disoriented or ill to jump through either statutory or contractual hoops.

A second issue concerns whether women who have lost either a statutory or contractual right to return but who have not been allowed back to work can claim ordinary unfair dismissal. This concerns women in two different types of situation. The first are those - discussed above - who have lost their right to return because they have failed to fulfil the notification requirements. The second are those who have fulfilled the notification requirements but were unable to return to work on the notified date because of illness. It is important to bear in mind that the courts have held that women in neither situation may bring a special maternity unfair dismissal claim. Hence, if they are unable to bring an ordinary unfair dismissal claim, they are deprived of any opportunity of obtaining legal redress.

The UK courts have largely agreed that women in these two types of situations cannot bring an ordinary unfair dismissal claim. They have however differed in their analyses for so deciding. It is important to look at the two different analyses given by the courts for deciding that women in these two situations cannot bring ordinary unfair dismissal claims as both the first analysis - the statutory analysis - and the second - the contractual analysis - would still appear to be good law in certain situations. Quite apart from these considerations, the way in which the courts analyse

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<sup>36</sup> [1983] IRLR 202 (CA). See also *Duwuona v. John Lewis Ltd* [1987] IRLR 310, *Kolfor Plant Ltd v. Wright* [1982] IRLR 311, *Institute of the Motor Industry v. Harvey* [1992] IRLR 343.

these situations to toss aside the statutory protection and expose the expectant mother to the rigours of the common law must make us question how sanguine we can be about letting UK courts get their common law claws on any set of statutory pregnancy and maternity rights.

### 3.1.2.1 *The statutory analysis*

This analysis relied on para.6(2) of Schedule 2 to EP(C)A<sup>37</sup> in order to state that, where dismissal occurred during the course of a woman attempting to return to work after maternity leave, the woman was excluded from claiming ordinary unfair dismissal. Courts employing this type of analysis assume or assert that the contract subsists during maternity leave but that the special right to claim maternity unfair dismissal is excluded by the woman's failure to comply with its requirements and that ordinary unfair dismissal claims are excluded because she is attempting to return to work after an absence for pregnancy or confinement.<sup>38</sup> Attempts to limit this tautological analysis by arguing that a woman, who has failed to comply with the requirements to return, never qualifies for the special dismissal right and hence cannot be excluded from an ordinary dismissal claim have failed on the ground that 'situations might arise where it would be right to find that an employee was attempting to return to work even though [notification] had not been given'.<sup>39</sup> The only positive aspect of this type of analysis is its assumption that the contract of employment continues to exist during maternity leave. This was used to good effect in *Institute of the Motor Industry v. Harvey*<sup>40</sup> where the woman had given correct pre-leave notification. During her leave, the Institute was restructured so that her job no longer existed. Her employer refused to discuss

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<sup>37</sup> This stated, 'an employee shall not be taken to be dismissed [for the purposes of ordinary dismissal] if the dismissal occurs in the course of the employee's attempting to return to work in accordance with her contract'. This was replaced in TURERA 1993 and the new wording is now to be found in s.84 ERA. This does not seem to wholly resolve - or remove - the problems under the old section. Under the ERA a woman still loses her right to return if she fails to comply with notification requirements. S.84(1)(b) applies to an employee who has the right to return and 'she is dismissed after the end of her maternity leave period, otherwise than in the course of attempting to return to work in accordance with her contract'. Such an employee can bring right to return claims in this situation only where she repays any unfair dismissal or redundancy payments given to her if employer so requests. So while women who fail to properly notify are no longer specifically excluded from bringing ordinary unfair dismissal claims, nor are they definitely permitted to.

<sup>38</sup> See *Lavery, Kolfor, Dowuona* all *supra* at n.36. See also *McKnight v. Adlestons (Jewellers) Ltd* [1984] IRLR 453 (NICA).

<sup>39</sup> *Institute of the Motor Industry v. Harvey* *supra* at n.36.

<sup>40</sup> *Ibid.*

what her new post might be until she notified her intended date of return. As most of her post-birth leave still remained, she refused to do so until the employer discussed alternative employment. The employer then withdrew her company car and suspended her pension rights. Before the end of her maternity leave she informed the employer that there had been a breakdown in mutual trust and confidence and lodged an ordinary unfair dismissal claim stating that she had been constructively dismissed. Evidently, she did not notify her employer of her intended date of return. The EAT rejected the employer's argument that there was no continuing contract after the woman went on maternity leave. Instead it stated, 'if a woman gives a notice of intention to take maternity leave in accordance with [statutory requirements] her contract of employment is likely to continue when she is on maternity leave unless it is terminated by agreement, resignation or dismissal'. Therefore, with the important proviso that the IT on rehearing would have to determine as a question of fact whether para.6(2) of Schedule 2 operated so as to exclude the ordinary unfair dismissal claim, the way was left open for an ordinary dismissal claim to proceed.

Para.6(2) of Schedule 2 was amended in 1993.<sup>41</sup> It remains to be seen how the courts will interpret the new provisions which do not seem to clearly state whether a woman who fails to fulfil all the necessary requirements is allowed or disbarred from bringing an ordinary unfair dismissal claim.

### *3.1.2.2 The contractual analysis*

This analysis does not get as far as worrying about whether the woman's claim falls under a special maternity dismissal head or an ordinary dismissal head. It is concerned with whether there has ever been a 'dismissal' which can be challenged in the first place. This concern stems from an analysis which states that, where a woman fails to comply with a statutory or contractual maternity leave procedure, the resolution of the employment relationship falls to be analysed in terms of the contract and the common law. There are many ways in which a contract of employment can come to an end which do not fall within the statutory definition of 'dismissal'.

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<sup>41</sup> See *supra* n.37.

*Kelly*<sup>42</sup> and *Crouch*<sup>43</sup> are excellent illustrations of the contractual analysis of women who have failed to comply with maternity leave procedures. Ms Kelly, at the end of her 29 week maternity leave could not return to work because of back trouble. She sent the employer four medical certificates, each covering four weeks absence. Following receipt of the fourth medical certificate, on 17 December 1984, the employer wrote to her stating that she would not be able to resume employment. She argued that the employer dismissed her with the December letter. The employer argued that her contract had come to an end when the first medical certificate ran out.<sup>44</sup> The Court of Appeal accepted the employer's arguments. The contract had come to an end on the day her four week extension had expired. The employer's failure to respond to Ms Kelly's medical certificates did not constitute implied agreement that her employment continued after the expiry of maternity leave.

In *Crouch*, the EAT gave a detailed exposition of the ramifications of the contractual analysis. Ms Crouch became pregnant and left work to have her child without fulfilling the requisite notification requirements. She received maternity pay from the employer until 30 September 1993 and wrote to her employer in November giving notice of her wish to return in December 1993. On 18 November 1993, the employer informed her that there was no job for her and that she had no right to return. The IT applied the statutory analysis to preclude her from claiming unfair dismissal. She appealed, arguing that the IT had erred in failing to find that the employers had dismissed her on 18 November 1993. The EAT stated that the IT had erred in assuming that the contract of employment continued to exist up to 18 November 1993. According to the EAT, where a pregnant employee leaves work without notifying her employer, it is not a question of whether one set of dismissal rights or another do or do not apply, it is a question of the impact on the contract of her actions. The contract of employment does not continue to exist unless the parties have expressly or impliedly agreed that it should do so. Hicks J warned that an implied agreement should only be inferred with great care.

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<sup>42</sup> *Kelly v. Liverpool Maritime Terminals Ltd* [1988] IRLR 310 (CA).

<sup>43</sup> *Crouch v. Kidsons Impey* [1996] IRLR 79.

<sup>44</sup> As employees who comply with maternity leave procedures have the right to extend their leave by four weeks by sending a medical certificate to the employer. See *supra* n.22 and accompanying text.

The thrust of this analysis is that it will generally mean that a woman who fails to notify and leaves work to have a baby has committed a fundamental repudiatory breach of her contract - by failing to work - which the employer may elect to accept. It is only if the contract can be construed in such a way as to show an agreement to continue the contract, or a waiver of the employee's repudiation, that the employee will have any slender hope of showing there has been a 'dismissal'. In *Crouch* the receipt of maternity pay from the employers was insufficient to show that a contract existed on 18 November 1993. Rather, Hicks J stated that both parties had either consensually extended the contract until 30 September 1993, when it consensually ended, or the employer had waived the initial repudiation by the employee until 30 September 1993, at which time they had accepted her continued repudiation by failing to return to work on 1 October 1993.

The contractual analysis can be used more kindly as illustrated in the EAT's decision that Ms Kaissi, a chambermaid employed by the Hilton Hotel group, was 'dismissed' by her employer.<sup>45</sup> This case involved a period of sick leave, followed by maternity leave and a further period of sick leave. The employer had been notified of her illnesses, but had received no notification relating to maternity leave. On 25 February 1991 Hilton informed her that, as she had not confirmed her intention to return to work, her employment had been terminated. The EAT stated that failure to comply with the maternity leave procedure did not terminate the contract as its continuance or discontinuance was a matter of contract, and not of statute. Unlike the *Crouch* EAT, however, the starting point adopted by the *Kaissi* EAT was that there was no express or implied agreement between the employers or the employees to bring the contract to an end until the letter of 25 February. This is very different from the *Crouch* starting point which stated that the contract will come to an end unless the parties otherwise agree. On the facts of this case, the dismissal had been unfair as the employer had failed to investigate further the situation of the sick employee before terminating her contract. Having decided that there was a 'dismissal', the EAT in *Kaissi* also attempted to mitigate the rigours of the statutory analysis by stating that the cases which are authority for the statutory analysis did not intend to lay down a proposition that no claim for ordinary dismissal can ever be brought by an employee who has failed to comply with a maternity leave procedure. Unsurprisingly, *Kaissi* was distinguished by the *Crouch* EAT, which attempted

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<sup>45</sup> *Hilton International Hotels Ltd v. Kaissi* [1994] IRLR 270.

to confine the more generous contractual analysis to its own specific facts.<sup>46</sup>

Even the few judicial decisions which attempt to make inroads into the general interpretation of the maternity leave procedures do little to brighten this blackspot of British individual employment rights. Stuck inside a interpretative framework where maternity rights are easy to lose - and once lost give way to two different methods of blocking claims for ordinary dismissal - it is difficult to be very optimistic about the extent to which the courts will adapt this framework in the new post-PD context.

### 3.1.3 Supplementing the 'floor of rights': employers and collective bargaining partners

As we have seen,<sup>47</sup> the old model was firmly premised on two rationales: voluntarism and business efficiency. As Drake and Bercusson have remarked, 'the future of maternity benefits will depend in practice on the extent to which trade unions...fight for provisions to be made in collective agreements safeguarding them'.<sup>48</sup> Employers' discretion to improve on the statutory rights must also be considered. It must be said that the promise of voluntarism was always unlikely to deliver in the sphere of pregnancy and maternity regulation. Those excluded from even the inadequate statutory rights by hours and length of service requirements and who, therefore, were reliant on collective bargaining to obtain any form of protection were precisely those most likely to be women and least likely to be unionised.

Moreover, it seems at least misguided to expect the British collective bargaining system to deliver substantial pregnancy protection, given that it has been and largely continues to be based on

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<sup>46</sup> The first cases emerging post-PD implementation have followed the contractual analysis to deny that there has been a 'dismissal'. In *Crees v. Royal London Insurance* [1997] IRLR 85, the EAT rejected the unfair dismissal complaint of a woman who had sent a medical certificate to her employer covering her for a further two weeks after the end of her 29 plus four weeks maternity leave entitlement on the ground that when an employee has lost her right to return to work, the contract of employment is emptied of all useful content and, as a matter of common sense as well as law, comes to an end in the absence of express agreement to the contrary. See also *Kwik Save Stores Ltd v. Greaves* reported in 564 IRLB March 1997 13 (communication of medical reasons for inability to return insufficient to constitute a 'return to work' for the purposes of ERA maternity protection). Both cases have now been joined in an appeal to the Court of Appeal.

<sup>47</sup> *Supra* at Section 3.1.

<sup>48</sup> C.D. Drake and B. Bercusson, *The Employment Acts 1974-1980* (Sweet and Maxwell: London, 1981) at 28.



procedural agreements with substantive bargaining focussing almost exclusively on pay. In this light, it is hardly surprising, therefore, that the 'floor of rights' model did not translate into changes in practice, even in those areas of female work which are covered by collective bargaining. Collective bargaining, by and large, has singularly failed to improve on the pregnancy and maternity provisions. The floor has turned out to be a ceiling. Those collective agreements which do mention maternity rights often merely replicate the statutory provisions.<sup>49</sup> McRae's major study in 1989 found little change in the level or spread of maternity rights in Britain over the last ten years. This is well illustrated by taking one of the major gaps in both the old and the new statutory models: the provision of a decent level of financial income during maternity leave. In theory, this is an issue which might have had some hope as an item on collective bargaining agendas as it concerns pay levels during the maternity leave absence. However, only 14% of employees received maternity pay as a result of collective or contractual agreements with their employers. In the private sector, this figure drops to 4%. To qualify for these payments, two-thirds of the workplaces surveyed required pregnant employees to have satisfied qualification requirements, generally based on length of service.<sup>50</sup>

Colling and Dickens, in their examination of three manufacturing sub-sectors in the UK to investigate to what extent 'equality bargaining' was developing, stress the conservativeness, narrowness and stability of the bargaining agenda. While signs of progress were detected in certain sectors, such as the finance sector, 'taken overall, the picture we found was of minimal or no provision of these kinds of benefits.'<sup>51</sup> Attempts at national level by particular unions to promote the inclusion in the bargaining agenda of matters of particular interest to women frequently seem to be abandoned, diluted or actively resisted at local level.<sup>52</sup> Furthermore, past attempts by unions to include creche facilities in the negotiating agenda had met with resistance and accusations of favouring 'women's' interests. In the banking industry, comparatively 'advanced' in this sphere,

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<sup>49</sup> L. Dickens, B. Townley and D. Winchester, *Tackling Sex Discrimination through Collective Bargaining: the impact of section 6 of the Sex Discrimination Act 1986* (HMSO: London, 1988) 8.

<sup>50</sup> McRae *supra* at n.25.

<sup>51</sup> T. Colling and L. Dickens, *Equality Bargaining: Why not?* (HMSO: London, 1989) at 20.

<sup>52</sup> See Colling and Dickens' *ibid.* discussion of local resistance or apathy to the GMB's institution of a comprehensive equal opportunities structure at 41-42.

the example of the Nat-West career-break schemes, one guaranteeing re-employment and re-training, the other operating a preferential hiring list for parents taking breaks for child care is highly illustrative of the business efficiency-deserving employee model in the UK. To qualify for either scheme, employees must, in the Bank's opinion, be capable of progression to the higher echelons of management. Often, the affording of particular benefits, such as for example, permitting male employees to take time off work at the time of the birth, are within management discretion rather than embodied in a collective agreement.<sup>53</sup>

### 3.2 Health and safety rationale: the Pregnancy Directive<sup>54</sup>

The scanty legal base options available for social policy measures in the main body of the EC Treaty are an essential background to understanding the scope and content of the PD. The PD is the tenth directive in a series of seventeen directives envisaged under Directive 89/391/EEC, a framework health and safety directive, which in turn derives its legitimacy from Art. 118a EEC, added to the Treaty in the Single European Act. Art. 118a provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of workers. The siting of EC legislative regulation of pregnancy in a health and safety context raises three central issues. The first is the exclusion of certain provisions because of the impossibility of justifying them on a health and safety basis; the second is the awkwardness and the novelty of squeezing some of the provisions included into a health and safety mould; the third is the possible incompatibility of a health and safety approach to pregnancy with an equality/discrimination approach to pregnancy regulation.

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<sup>53</sup> See McRae *supra* at n.25 who reports that while in half of all the surveyed workplaces male employees were able to take time off around the time of the birth in 60% of these cases time off was granted at management's discretion. However, the *EOR* survey of 350 employers' paternity leave policies carried out in November 1993-January 1994 reveals some promising signs of change in this area. The survey found that two-thirds of organisations had paternity leave provisions introduced as part of an Equal Opportunities policy. In the majority of organisations, paternity leave was introduced in or after 1990. In almost 80% of cases this leave had been agreed with unions. However, 74% of the organisations covered in the survey employed 500+ employees. The leave was of a median length of 5 days (compared to the TUC recommendation of 10 days paid leave with the option of taking longer unpaid leave if necessary); see 55 *EOR* (1994) 14.

<sup>54</sup> A modified version of this section and parts of Section 3.3. and 5.3. can be found in Kilpatrick, 'How long is a piece of string? European regulation of the post-birth period' in T.K. Hervey and D. O'Keefe (eds) *Sex Equality Law in the European Union* (Wiley: Chichester, 1996) 81.

Moreover, the final version of the PD differs considerably from the original proposal put forward by the Commission's Equality Unit. It is worth looking briefly at the changing content of the various shapes the draft proposal took as it moved through the legislative process laid down by Art.118a. It demonstrates the chasm between the treatment of and attitudes towards pregnancy in the UK and the other Member States, and the down-grading of the substantive protection originally proposed in the political compromises necessary to reach an acceptable text.

### 3.2.1 Changing the proposal

The original proposal<sup>55</sup> required, *inter alia*, a minimum of sixteen weeks fully paid maternity leave, a ban on dismissal and non-selection for a job on account of pregnancy, paternity leave at the time of the birth and a list of jobs barred to pregnant or breast-feeding women. The full Commission dropped the paternity leave provision and reduced the period of maternity leave to fourteen weeks. This period was however fully paid, and Member States who wished to provide longer periods of leave had to ensure that women received at least 80% of their salary. The only condition for qualifying for the period of paid maternity leave was to be employed or in receipt of unemployment benefit.

Following the co-operation procedure laid down for directives based on Art.118a, the ECSC approved the text as a 'coherent health and safety package'.<sup>56</sup> The European Parliament approved the text, but wanted the sixteen week period re-instated.<sup>57</sup> At this point, in the Council of Ministers, the UK insisted that only those articles of the proposal dealing with health and safety could be dealt with by the qualified majority procedure and the Commission threatened to withdraw the text. The political compromise finally reached sacrificed much of the text's utility. In particular, maternity leave is no longer to be a period of full pay but will be remunerated at an 'adequate level' equivalent to at least the level of sick pay in the Member State concerned and may be conditional on a service qualification of up to twelve months. Both the UK and Italy abstained from the vote; Italy on the ground that the text had been diluted to the point of being

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<sup>55</sup> For a fuller account of the PD's passage see Ellis, 'Protection of Pregnancy and Maternity', 22 *ILJ* (1993) 63.

<sup>56</sup> OJ/C41/30 (18.2.1991).

<sup>57</sup> OJ/C19/177 (28.1.1991).

worthless. On the second reading in the European Parliament, the re-instatement of the sixteen week period of maternity leave was demanded and the connection between pregnancy and sickness was strongly objected to.<sup>58</sup> The final text largely reflects the UK's influence. It includes the fourteen week leave,<sup>59</sup> the basing of maternity pay levels on national sick pay levels,<sup>60</sup> and reduced protection for pregnant women on nightwork.

### 3.2.2 The three issues

As referred to above, the siting of European legislative regulation of pregnancy in health and safety, while the only politically feasible option, presents three main problems. The first of these - the *exclusion* of certain issues from the legislative agenda - is clearly illustrated by the dropping of the paternity leave provision included in the Equality Unit's original proposal by the full Commission. This reveals the limitations placed on the ability of the EC to construct legislation aimed at redefining the allocation of care responsibilities between parents and forces pregnancy to be treated in a 'health and safety vacuum' divorced from the broader problems pregnancy and childcare present for women.

Secondly, the *inclusion* of provisions such as the ban on pregnancy dismissals and the right to full pay (later reduced to adequate level of remuneration) demonstrates both the Commission's ingenuity and the awkwardness of placing such rights within a framework directed solely towards the protection of health and safety. Thus the ban on dismissal is justified on health and safety grounds, it being argued that 'the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers...; whereas provision should be made for such dismissal to be prohibited.'<sup>61</sup> Pay is squeezed in by stating that measures concerning the protection of the health of pregnant workers, those who have just given birth or

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<sup>58</sup> OJ/C150/99 (15.6.1992).

<sup>59</sup> Art.8(1) PD. Art.8(2) PD requires compulsory maternity leave of at least two weeks before and/or after confinement.

<sup>60</sup> Art.11(3) PD. A Council and Commission statement appended to the Directive states that 'such a reference is not intended in any way to imply that pregnancy and childbirth be equated with sickness'.

<sup>61</sup> Preamble Recital 15.

those who are breastfeeding, ‘...would serve no purpose unless accompanied by the maintenance of rights linked to the employment contract, including maintenance of payment and/or entitlement to an adequate allowance.’<sup>62</sup>

The third issue, and the one most difficult to disentangle, is the *tandem regulation* of pregnancy by, on the one hand, a health and safety directive and on the other, by Community equality legislation, as elaborated in a series of cases by the ECJ. As this is discussed in more detail *infra*,<sup>63</sup> we confine ourselves here to examining potential problems revealed through examination of the principal axes on which all the Community health and safety legislation, stemming from Art. 118a, is oriented. Emphasised in Art. 118a and consistently reiterated and underlined in Directive 89/391 and the PD itself are three themes. The first is that the measures are designed to establish ‘minimum requirements’; the second is that the measures are taken with a view to harmonising conditions, while maintaining the improvements made; the third is the stress placed on the fact that these directives do ‘not justify any reduction in levels of protection already achieved in individual Member States.’

As Lyon-Caen remarks on Art. 118a, ‘la finalité des interventions est rappelée: il s’agit de harmonisation dans le progrès des conditions existantes. Cependant, une certaine inquiétude peut naître de ce que plus loin le même article mentionne l’édition de prescriptions minimales; ce qui n’est pas sans quelque contradiction...’<sup>64</sup> This contradiction seems to reflect a ‘compromise’ model of upward harmonisation. While the aim is to reach the level of the Member State with most protection, Community legislation will settle for a standard generally slightly higher than the lowest standards found in the respective Member States to prevent harmonisation downwards and in the hope that the conditions will be created to harmonise upwards. If these conditions are not created, at least this model ensures that the level of protection will not decrease. To some extent, therefore, this model privileges the status quo (which inevitably entails differing levels of protection) over harmonisation. This in turn can be seen as reflecting a basic maxim of health and safety regulation, that is, that more protection is always better. While in many health and safety

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<sup>62</sup> Preamble Recital 16.

<sup>63</sup> See *infra* Sections 3.3.3., 3.4. and 5.3.1.

<sup>64</sup> G. Lyon-Caen and A. Lyon-Caen, *Droit social international et européen* (Précis Dalloz: Paris, 1991) 285.

areas it may be a good policy strategy to forbid regression<sup>65</sup> towards the minimum standards laid down by a particular directive, in the case of pregnancy, child-birth and breast-feeding it is not at all evident that this clear equation holds. In particular, it may conflict with particular conceptions of equality which qualify certain types of pregnancy and maternity protection as discriminatory.<sup>66</sup>

### **3.3 Equality rationale: the ETD, the SDA, the ECJ and the UK courts**

While the shape of what should be permissible as 'special' treatment is very differently drawn in France and Britain by legislation and doctrine alike, on the pregnancy issue there is a shared consensus - implicit in France, and argued for in critical analyses of the UK system of pregnancy provision - that pregnancy, being a uniquely female condition, should be protected as such. While other differences may be seen as socially constructed and ascribed to women rather than chosen by women, in both countries there is a consensus that 'an uncontestable difference between men and women... is their different biological roles in reproduction.'<sup>67</sup>

This, in turn, led to attempts in the UK by dismissed pregnant employees - excluded from obtaining protection from specific pregnancy legislation - to use sex discrimination provisions to challenge the employer's decision to dismiss, this being the only possible avenue of legal redress open to them. Simultaneously, the ECJ was developing a pregnancy and maternity jurisprudence in its interpretation of the ETD. A number of possible approaches can be distinguished which have been utilised by the courts in conceptualising pregnancy as discrimination. The first two are based on comparison, the third is based on pregnancy as intrinsic to one sex, and the others combine elements of the comparative and non-comparative approaches.

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<sup>65</sup> See Art.1(3) PD: 'this Directive may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding as compared with the situation which exists in each Member State on the date on which this Directive is adopted'.

<sup>66</sup> The relationship between these two types of provision is discussed in more detail *infra* in Sections 3.3.3., 3.4. and 5.3.1.

<sup>67</sup> Kenney, 'Reproductive Hazards in the Workplace: the Law and Sexual Difference', 14 *International Journal of the Sociology of Law* (1986) 393. See also Fredman, 'European Community Discrimination Law: A Critique', 21 *ILJ* (1992) 119 at 121 who states '...pregnancy, being a genuine difference'; see also T.K Hervey, *Justifications for Sex Discrimination in Employment* (Butterworths: London, 1993) 155.

### 3.3.1 The first comparative approach: no comparison possible

In *Turley v Allders Department Stores Ltd*<sup>68</sup> the EAT rejected the proposition that pregnancy discrimination was sex discrimination on the ground that as men could not get pregnant, there was no masculine equivalent to a pregnant woman and as like had to be compared with like to sustain a sex discrimination claim, the claim failed. This approach has held sway not only in the UK but in the Anglo-American legal sphere more generally.<sup>69</sup> Hare has dubbed this approach 'absolute comparability' while the subsequent approach, outlined below, is defined as 'substantial comparability'.<sup>70</sup>

### 3.3.2 The second comparative approach: the hypothetical man

The door for pregnant women into the provisions of the SDA was opened again by the EAT in *Hayes*,<sup>71</sup> which held that *Turley* applied only where the reason for dismissal was the actual pregnancy itself. If instead, it was a factor connected with pregnancy, the pregnant woman could be compared to a sick man and thus sustain her claim. This approach was attached to the necessity of a comparison to ground a sex discrimination claim but did not debar claims on the ground that a pregnant man was never going to be available. As Glidewell LJ explained in *Webb*, 'To postulate a pregnant man is an absurdity, but I see no difficulty in comparing a pregnant woman with a man who has a medical condition which will require him to be absent for the same period of time and at the same time as does the period of the woman's pregnancy'.<sup>72</sup> Refinements on this 'sick man' analogy consisted in determining which sort of sick man she was more like: a man with a hernia, a man undergoing a hip replacement or a prostate operation. In this analysis, a woman is, because of her pregnancy, to be treated no less favourably than a man with a similar inability to work. This

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<sup>68</sup> [1980] IRLR 4.

<sup>69</sup> See in the US, *General Electric Company v. Gilbert* 429 US 125 (1976) and in Canada, *Attorney-General of Canada v. Bliss* 92 DLR (3d) 417 (1978).

<sup>70</sup> Hare, 'Commentary: Pregnancy and Sex Discrimination', 20 *ILJ* (1991) 124 at 127.

<sup>71</sup> 1. *Hayes v. Malleable Working Men's Club and Institute*; 2. *Maughan v. North East London Magistrates' Court Committee* [1985] IRLR 367.

<sup>72</sup> *Webb v. EMO Air Cargo Ltd* [1992] IRLR 117 (CA) at paragraph 34 of the judgment.

approach has proved a great favourite with the British courts.<sup>73</sup>

### 3.3.3 The no-comparison necessary approach

Just as national courts had to grapple with the relationship of pregnancy and discrimination, so did the ECJ, most notably in the sister-cases *Dekker*<sup>74</sup> and *Hertz*.<sup>75</sup> The approach taken in these cases focussed firmly on the inextricable link between pregnancy and sex. In *Dekker*, the Court decided that refusal to employ a pregnant woman was direct discrimination. It was irrelevant that there were no male applicants. As pregnancy was directly related to the applicant's sex, there was no need for a male comparator. Nor could the employer argue that the reason was not the pregnancy *per se* but the detrimental financial consequences for the firm if she were hired. The *Hertz* decision followed hot on the heels of *Dekker*. It concerned the dismissal of a woman repeatedly absent for pregnancy-related illnesses which continued beyond child-birth. Examining Art.2(3) ETD, which permits measures for 'the protection of women, in particular those which concern pregnancy or maternity', the Court designated two periods. During the first - the 'protected period' (equivalent to the period of pregnancy plus maternity leave in each Member State) - it is direct discrimination to dismiss a pregnant woman.<sup>76</sup> The characterisation of pregnancy as direct discrimination and the rationale of *Dekker*, which concerned job access, has been reinforced in two subsequent decisions, *Habermann-Beltermann*<sup>77</sup> and *Webb*,<sup>78</sup> which have applied the no-comparison necessary approach to dismissal. *Habermann-Beltermann* is interesting in this context for two other reasons.<sup>79</sup> It illustrates the possibility of complementarity and of collision between the ETD and the PD.

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<sup>73</sup> See *infra* Section 3.3.5.

<sup>74</sup> Case C-177/88 *Dekker v. Stichting Vormingscentrum voor Jonge Volwassenen* [1990] ECR I-3941.

<sup>75</sup> Case C-179/88 *Handels-og Kontorfunktionaerernes Forbund i Danmark (acting for Hertz) v. Dansk Arbejdsgiverforening (acting for Aldi Marked K/S)* [1990] ECR I-3979.

<sup>76</sup> For the second period, see *infra* Section 3.3.4.

<sup>77</sup> Case C-421/92 *Habermann-Beltermann v. Arbeiterwohlfahrt, Bezirksverband Ndb/Opf eV* [1994] ECR I-1657.

<sup>78</sup> Case C-32/93 *Webb v. EMO (Air Cargo) Ltd* [1994] ECR I-3567.

<sup>79</sup> For a third context - the fixed-term contract exception - in both *Habermann-Beltermann* and *Webb* see *infra* Section 3.3.6.



On March 23 1992, Ms Habermann was employed as a night-attendant in a home for the elderly, having specifically requested a nightwork contract for family reasons. Following a period of absence for illness, at the end of May she informed her employers that she had been pregnant since March 11 - twelve days before her employment contract commenced. The applicable German law prohibited pregnant women performing nightwork. The employers considered that Ms Habermann's contract was void as the German Civil Code provides that any legal act contrary to a statutory prohibition shall be void.

The employers argued that Art.2(3) gave Member States a margin of appreciation in deciding how to implement protection, and that allowing a contract such as the present one to continue, would be detrimental to pregnant women, in that it would mean paying them for the period of their pregnancy, without their working, being sick or taking leave. This in turn, it was argued, could lead to a deterioration in the woman's relationship with her employer.<sup>80</sup> The ECJ emphatically rejected these arguments, using the no-comparison necessary approach.<sup>81</sup>

These facts are of interest because they blur the distinction drawn between discrimination in hiring (not covered by the PD) and discrimination in dismissal (covered by the PD). As AG Tesouro pointed out, this formal legal distinction would lead in either case to the women losing her job. He added that, in relation to measures taken under Art.2(3) "discrimination" permitted in order to take account of maternity, and therefore to protect women, cannot be practised in such a way as to exclude women from the labour market.<sup>82</sup> Thus, in this sense, the PD and the ETD complement and reinforce one another to provide a high standard of protection for pregnant employees from the beginning of pregnancy until the end of maternity leave. Comparative arguments which could lead to a down-grading of the level of protection and arguments relating to employer costs are rejected with a clear focus on the maintenance of the employment status of

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<sup>80</sup> The UK government intervened in this case to argue that as Art.2(3) ETD (as interpreted by the ECJ in *Stoeckel*) and the PD permitted the prohibition of night work for pregnant women, and that the contract had come to an end, the employer was not in breach of Arts.2(1) and 5(1) ETD.

<sup>81</sup> 'It is clear that the termination of an employment contract on account of the employee's pregnancy, whether by annulment or avoidance, concerns women alone and constitutes, therefore, direct discrimination on grounds of sex'; Paragraph 15 of the judgment.

<sup>82</sup> Paragraph 11, AG Tesouro's Opinion.

the pregnant employee and the importance of not excluding her from the labour market.

However, as Jacqmain has rightly pointed out, this decision also illustrates the potential for collision between the ETD and the PD.<sup>83</sup> As we saw earlier,<sup>84</sup> the PD is premised on a compromise model of harmonisation; one which does not allow Member States to backtrack on current protective standards. The German legislation in question here imposes a higher standard than the PD in prohibiting night work over the whole duration of the pregnancy. Is this compatible with the ETD? What happens when an employer has no employment to offer a pregnant job applicant because of higher national standards of health and safety protection or because it will contravene the PD? These questions - for now - remain unanswered but demonstrate that the Court will have to improve the quality of its reasoning on the discretion afforded Member States under Art.2(3) ETD<sup>85</sup> and face the ramifications of no-regression in EC health and safety legislation in order to work out a relationship between these Directives in concrete situations.

### **3.3.3bis Doctrinal evaluation of the various comparator approaches**

Within the framework of anti-discrimination law, the issue as to whether or how the male comparator problem can be dealt with continues to divide doctrinal opinion in the UK. There seem to be three basic positions. The first denigrates the need for a male comparator and applauds the ECJ for recognising that conceptual acrobatics are unnecessary when pregnancy discrimination is accepted as direct sex discrimination.<sup>86</sup> The 'false seductiveness'<sup>87</sup> of a series of 'patently nonsensical decisions'<sup>88</sup> which require a male comparator to prove discrimination in a situation where a male comparator is regarded as an absurdity - and where the consideration of employer

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<sup>83</sup> 'Pregnancy as Grounds for Dismissal', 23 *ILJ* (1994) 355.

<sup>84</sup> See *supra* Section 3.2.

<sup>85</sup> See further on the Court's interpretation of Art.2(3) ETD *infra* Section 5.3.1.

<sup>86</sup> Bailey, 'The wording of section 60 of E.P.C.A. 1978', 17 *ILJ* (1988) 191 at 194; Lacey, 'Dismissal by Reason of Pregnancy', 15 *ILJ* (1986) 43 at 45; Fredman (1992) *supra* at n.67; More, 'Reflections on pregnancy discrimination under European Community Law', 1 *Journal of Social Welfare and Family Law* (1992) 48.

<sup>87</sup> Bailey *ibid.* at 192.

<sup>88</sup> More *supra* at n.86 at 48.

costs is omnipresent - is condemned. The second, while accepting that comparability is not the ideal approach in pregnancy cases, argues that the structure of the SDA - fundamentally premised on comparability - does not allow for the *Dekker* approach to be adopted, recommends that the *Hayes* 'sick man' approach<sup>89</sup> be adopted in the short-term and that a specific clause be inserted in the SDA to provide express protection against pregnancy discrimination in employment.<sup>90</sup> Finally, there are those who feel that the 'sick man' analogy has some merit, since the reason why the employer is dismissing or refusing to employ a pregnant employee is the adverse financial consequences which will result if the pregnant woman becomes or remains an employee. This argument says that it is artificial not to recognise that it is the consequences of pregnancy, rather than the pregnancy itself, which is the central problem. From this perspective, the *Dekker* reasoning is skewed, and Hare, for example, suggests that a more legally coherent response by the ECJ would have been to use the wording of the ETD to outlaw pregnancy discrimination as discrimination on grounds of family status instead of pushing it inside direct sex discrimination.<sup>91</sup>

### 3.3.4 Combined approach 1: the temporal distinction in *Hertz*

The first combination approach is that developed by the ECJ in their pregnancy jurisprudence, particularly in *Hertz*. This involves combination of the non-comparative and comparative discrimination approaches which are now distinguished on a temporal basis. Taken together, the PD and the ETD indicate the no-comparison necessary protection afforded to the pregnant employee from the beginning of her pregnancy until the end of her maternity leave. However, at this point the 'badge of protection' is removed; the only protection afforded is of a comparative nature; thus in Ms Hertz's case, if a man who had been absent from work as often as her would have been dismissed, it would not be discriminatory to dismiss her.<sup>92</sup>

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<sup>89</sup> See *supra* n.71.

<sup>90</sup> Hare *supra* at n.70 at 125-128; see generally Pannick, 'Sex Discrimination and Pregnancy: Anatomy is not Destiny', 3 *Oxford Journal of Legal Studies* (1983) 1.

<sup>91</sup> Hare *supra* at n.70 at 129; see also Pannick *ibid* at 21 who suggests this.

<sup>92</sup> See also Case C-400/95 *Handels-Og Kontorfunktionaerernes Forbund i Danmark (acting on behalf of Helle Elisabeth Larsson v. Dansk Handel & Service (acting on behalf of Fotex Supermarket A.S.))* asking for clarification of the relationship between pregnancy-related illnesses, the 'protected period' and the ETD. AG D.Ruiz-Jarabo Colomer in his Opinion of 18 February 1997 recommended that the Court reply as follows, 'The combined provisions of Arts.5(1) and 2(1) ETD do not preclude the dismissal of a woman on grounds of absences subsequent to her

### 3.3.4bis Doctrinal evaluations of the temporal distinction

Recently, attention in the UK has turned to a sustained critical examination of the general approach taken by the ECJ in its conceptualisation of equality between the sexes.<sup>93</sup> In particular, where pregnancy is concerned, discussion has focused on the combined impact of *Dekker* and *Hertz*. While for Fredman, *Dekker* represents the 'greatest stride towards transcending a purely male norm' taken by the European Court, *Hertz* represents the reassertion of the equivocal nature of equality. She argues, 'if pregnancy is unique to women, so are its longer term consequences: it is difficult to see why a rigid dividing line should be drawn at the moment maternity leave ends.'<sup>94</sup> Similarly, More argues that while *Dekker*, taken alone, may have indicated a shift in the Court's approach to gender discrimination, *Hertz* demonstrates that the Court is still trapped in the 'sameness-difference' dialectic rather than adopting an 'advantage-disadvantage' model.<sup>95</sup> She characterises the AG's argument that giving full protection for all pregnancy-related illnesses may, in the long run, discourage the employment of women of child-bearing age, as flowing from a 'sameness-difference' model which obscures the disadvantaged status of women.<sup>96</sup>

### 3.3.5 Combined approach 2: sidestepping the no-comparison necessary approach

The second combined approach - associated with the UK courts - may be described as a 'false'

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maternity leave where these absences are due to an illness which appeared during the pregnancy and continued throughout the maternity leave and thereafter, but these provisions do not allow periods of sick leave granted in respect of health problems arising from pregnancy prior to the birth to be taken into account when absences are calculated with a view to dismissal'.

<sup>93</sup> See in particular the work of Sandra Fredman: (1994) *supra* at n.2, (1992) *supra* at n.67 and Gillian More: 'Equal Treatment' of the Sexes in European Community Law: What does "Equal" Mean?', 45 *Feminist Legal Studies* (1993) 1, (1992) *supra* at n.86.

<sup>94</sup> Fredman (1992) *supra* at n.67 at 122.

<sup>95</sup> More (1992) *supra* at n.86 at 53.

<sup>96</sup> But see Cromack, 'EC Pregnancy Directive: Principle or Pragmatism', 2 *Journal of Social Welfare and Family Law* (1993) 262 at 267 who argues that the Court followed the same approach in both *Hertz* and *Dekker*. She interprets *Hertz* as saying that the dismissal of a female employee because of her pregnancy equals direct discrimination during the maternity leave period. See also Rubenstein, 'Highlights: January 1991', [1991] IRLR 1 who states that *Hertz* 'on balance also extends the protection of pregnant women under EC law.'

combination in that it attempts to introduce the comparative approach by the back-door. Its interest lies in demonstrating the extraordinary difficulties the UK courts have encountered in trying to come to terms with the no-comparison necessary approach. As we saw in Chapter 3, the UK courts have found it extremely difficult to be imaginative in considering what sort of comparisons are necessary to found a discrimination complaint.<sup>97</sup> At least part of the reason for this is s.5(3) SDA, which states that comparisons of the cases of persons of different sexes for any discrimination complaint under the SDA 'must be such that the relevant circumstances in the one case are the same, or not materially different, in the other'. From *Hayes*<sup>98</sup> up until *Dekker*, the UK courts happily applied the 'sick man' comparator approach in pregnancy discrimination cases. Thus both the IT and the EAT (decided pre-*Dekker*) applied the sick-man approach to reject the discrimination complaint in *Webb*. However, before the Court of Appeal heard Ms Webb's appeal, *Dekker* and *Hertz* were decided.<sup>99</sup>

The facts in *Webb* were designed to pitch the rights of the pregnant employee against the financial and administrative difficulties faced by the small employer. EMO employed sixteen people, one of which, Ms Stewart, was the import operations clerk in a four strong import operations team. Ms Stewart became pregnant and Ms Webb was taken on to learn her job before she took maternity leave. Ms Webb was to be kept on as an employee following Ms Stewart's return to work. Several weeks after Ms Webb started work, she discovered that she was pregnant. EMO considered that they had no option but to dismiss her.

The Court of Appeal in *Webb* robustly reasserted the comparative approach, distinguished *Dekker* on the facts and stated that, in any case, it would be impossible to apply the ECJ judgment without

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<sup>97</sup> See Chapter 3, Section 2.3.3.

<sup>98</sup> See *supra* Section 3.3.2.

<sup>99</sup> The first reported post-*Dekker* decision is *Berrisford v. Woodard Schools* [1991] IRLR 247. An unmarried matron in a Church of England girls' boarding school was dismissed when she stated that she had no immediate plans to marry. The EAT decided by a majority that there was no sex discrimination. *Dekker* (no-comparison necessary) only applied where there was dismissal for pregnancy without more. Here, as it was the fact of pregnancy coupled with continuing unmarried status, the comparative test would be applied. Applying that test, the dismissal was not discriminatory as there was evidence that a man engaging in extra-marital sexual activity would also have been dismissed. The dissenting lay member applied the no-comparison necessary approach.

distorting the wording of the SDA.<sup>100</sup> The House of Lords in *Webb* stated (following *Dekker*) that in general to dismiss a woman because she is pregnant is unlawful direct discrimination. Since childbearing and the capacity to bear children are characteristics of the female sex, to apply these characteristics is to apply a gender-based criterion. Where, however, the employer has a gender-neutral explanation which is put forward and accepted by the court as genuine, the question then becomes whether a man would have been dismissed in comparable circumstances. On the facts in this particular case, the House of Lords felt that an employer would have dismissed a man absent for a similar 'critical period'.<sup>101</sup> It is not difficult to envisage how few employers would put forward pregnancy as the real reason for the dismissal and how easy it would be to find a 'gender-neutral' reason for dismissal of the pregnant employee. However, the House of Lords did make a reference to the ECJ to find out what bearing the ETD would have on such facts. As we know,<sup>102</sup> the ECJ categorically stated that Ms Webb had been directly discriminated against on grounds of sex and hence the ETD had been contravened.

Before the House of Lords had to face up to dealing with the ECJ *Webb* judgment, a few other courts were finding imaginative ways of blockading any move towards the no-comparison necessary approach. It seems clear that the House of Lords in *Webb* had tried to find a compromise position between the no-comparison necessary test and the 'hypothetical' comparator test by asserting that, in general, to dismiss a woman because she is pregnant is unlawful direct discrimination. This aimed to shift the emphasis towards the no-comparator necessary approach, while keeping the comparative approach available for exceptional circumstances.

This was not the view of the EAT hearing the joint appeals of two women claiming pregnancy

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<sup>100</sup> The Court of Appeal then applied its own precedent in *Webb* in *Shomer v. B&R Residential Lettings Ltd* [1992] IRLR 317 (CA). In this case, the Court of Appeal reasserted with much conviction the 'hypothetical man' comparator test and overturned the IT's decision on the grounds that it had misapplied s.5(3) SDA by not giving the hypothetical man the characteristics that he was going to suffer from a disability and was guilty of misconduct. (The pregnant woman dismissed in this case had failed to leave her company car at the employers' disposal as she had been requested while she went on holidays and found a dismissal letter awaiting her at home on her return). *Dekker* was unceremoniously brushed aside on the ground that the Court of Appeal is obliged to follow its own precedents.

<sup>101</sup> *Webb v. EMO (Air Cargo) Ltd* [1993] IRLR 27 (HL). For commentary on this decision see Szyszczak, 'Sex Discrimination and Pregnant Women', 22 *ILJ* (1993) 133.

<sup>102</sup> See *supra* n.78.

discrimination.<sup>103</sup> Ms Dixon was sacked from her hairdressing job when she became pregnant and the employer found a suitable replacement. Ms Hopkins was sacked from her job as a veterinary nurse when she became pregnant as the employer took the view that it was unsafe to expose her to the health risks of X-rays, animal infections and the need to lift heavy weights.<sup>104</sup> In both cases, the ITs had found that a comparable man would have been dismissed. On appeal it was argued that the House of Lords in *Webb* had changed the test so that if dismissal was based essentially on the woman's pregnancy, it was direct discrimination. The EAT stated that the House of Lords had not changed the test to be applied. When the House of Lords had stated that 'in general' to dismiss a woman because she is pregnant is direct discrimination, 'in general' meant 'without more'. *Webb* was no more exceptional than these two cases. If a comparison had to be made in *Webb*, so too would comparisons be made here. Since Ms Dixon was dismissed because of the business convenience of an employer who would have treated a man in exactly the same way, her case was not one of pregnancy without more. Similarly, the case of Ms Hopkins was not one of dismissal for pregnancy without more but one where the Tribunal found that the employers acted genuinely out of concern for themselves and for the unborn child and that they would have acted similarly in a comparable situation involving a man.

The Scottish Court of Session's decision in *Brown v. Rentokil* involved yet another ploy to distinguish out of existence the no-comparison necessary approach.<sup>105</sup> Ms Brown was absent almost from the beginning of her pregnancy in August 1990 and was dismissed in 1991. The court stated that it is clear that at EC level a clear distinction was drawn by the ECJ between dismissal due to illness caused by pregnancy and dismissal due to the mere fact of being pregnant. In their view, *Hertz* makes it clear that the ETD does not apply in the case of an employee whose illness was attributable to pregnancy, unless a provision giving protection applies under the employee's own national law. *Hertz* could not be distinguished on the grounds that it dealt with an illness sometime after pregnancy, whereas the present case dealt with an illness during pregnancy. This approach blithely ignores the temporal distinction drawn in *Hertz* and is a barely veiled attempt to introduce the comparative approach during the 'protected period' through the back door.

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<sup>103</sup> *Dixon v. Rees; Hopkins v. Shepherd & Partners* [1993] IRLR 468.

<sup>104</sup> All the female litigants in these cases had less than two years service.

<sup>105</sup> [1995] IRLR 211 (Court of Session).

The House of Lords' judgment in *Webb* second time round is remarkable.<sup>106</sup> It underlines the willingness of even the highest level British courts to eventually buckle under and try to apply the no-comparison necessary approach in a context where that was by no means straightforward. In a judgment which surely strained the *Marleasing* interpretative obligation<sup>107</sup> to its absolute limits, s.5(3) SDA was re-read in order to accommodate the no-comparison necessary approach. The House of Lords stated:

In a case where a woman is engaged for an indefinite period, the fact that the reason why she will be temporarily unavailable for work at a time when to her knowledge her services will be particularly required is pregnancy is a circumstance relevant to her case, being a circumstance which could not be present in the case of a hypothetical man. This is the only way in which the more precise test of unlawful discrimination set out in ss.1(1)(a) and 5(3) of the Sex Discrimination Act can be construed so as to accord with the ruling of the European Court of Justice.

This statement is anything but a model of clarity. It seems that the wheel has turned almost full circle. We are back to the no-comparison possible interpretation of the SDA, with the (welcome) twist that when no comparison is possible because of pregnancy, it *is* unlawful discrimination.<sup>108</sup>

That the House of Lords is still not entirely happy with the state of affairs in which British discrimination law has been left following ECJ intervention is clear from its decision to make a further reference to the ECJ in *Brown v. Rentokil*.<sup>109</sup>

### 3.3.6 Combined approach 3: the ECJ plays with 'the protected period'

The ECJ, having drawn up a clear set of pregnancy protection principles in *Hertz* and *Dekker*,

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<sup>106</sup> *Webb v. EMO Air Cargo Ltd (No.2)* [1995] IRLR 645 (HL).

<sup>107</sup> See Chapter 3 at n.132.

<sup>108</sup> See the application of *Webb(No.2)* in *O'Neill v. (1)Governors of St Thomas More RCVA Upper School (2) Bedfordshire County Council* [1996] IRLR 372. In this case, it was held that the dismissal of a female teacher of religious education in a Roman Catholic school when it was discovered that she had become pregnant as a result of a relationship with a Roman Catholic priest was sex discrimination. The EAT stated that the important issue was not whether it was pregnancy *per se* which led to the dismissal but whether there was a causal connection between the pregnancy and the dismissal.

<sup>109</sup> Discussed above at text accompanying n.105.



has also resorted to rather less principled distinctions when it deemed it appropriate. The first of these concerns the question of who is protected during the 'protected period'? In *Webb* and *Habermann-Beltermann*,<sup>110</sup> the Court drew a distinction between pregnant employees on indefinite contracts and pregnant employees on definite or fixed-term contracts. To understand this badly reasoned distinction, it is useful to look at the Commission's submissions to the Report of the Hearing in the *Webb* case. According to the Commission, the facts of this case<sup>111</sup> raise the issue of whether the dismissal of a pregnant employee constitutes sex discrimination in all circumstances. They felt that to say so could lead to 'manifestly absurd results', and gave the example of an employer taking on staff for the Christmas period dealing with six-month pregnant applicants. The Commission, having taken this line, outlined two ways of avoiding this result. The first is that *Dekker* is concerned only with indefinite contracts of employment and therefore the direct discrimination ban on dismissals applies only to employees on indefinite contracts. The second argument is that, if the Court wants to maintain that dismissal on grounds of pregnancy constitutes direct discrimination, whatever the circumstances, this wide concept of direct discrimination should be balanced by admitting the possibility that direct discrimination might be justified in certain circumstances. Therefore, if Ms Webb had been hired as a temporary replacement, her dismissal according to the first approach would not have constituted discrimination, and according to the second, the discrimination involved in dismissing her would have been justifiable.

The Court, unwilling to enter the treacherous territory of the relationship between direct discrimination and justification,<sup>112</sup> opted for the first approach. This does not make their unspecified reference to the exclusion of fixed-term pregnant employees any more principled or inviting. It was jumped upon with relief by the House of Lords in *Webb No.2*.<sup>113</sup> Fortunately, the first UK court faced with an argument on the possible application of this 'protection exception'

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<sup>110</sup> Cited *supra* at n.78 and n.77.

<sup>111</sup> For the facts see text following *supra* n.99.

<sup>112</sup> See Hepple, 'Can Direct Discrimination be Justified?', 55 *EOR* (1994) 48. While the Court avoided this question, the answer they give in practice allows justification of direct discrimination.

<sup>113</sup> See in particular paragraphs 7 and 8 of Lord Keith's judgment.

has firmly stated that it must be very restrictively construed.<sup>114</sup>

The second issue which the ECJ has had to confront is the question of what exactly is protected by equality law during the period from the beginning of pregnancy to the end of maternity leave. Rubenstein argues that there are two possibilities.<sup>115</sup> The first is that reflected, by and large, in the PD, namely that a woman's employment *status* is protected during this protection period but that status is disengaged from *payment* during this period.<sup>116</sup> The second argument states that this protection is devalued if it is not accompanied by pay protection, and that the reduction in salary during maternity leave can only affect women and therefore constitutes direct discrimination on grounds of sex. This formulation takes the approach that any unfavourable treatment on grounds of pregnancy and maternity is *per se* direct discrimination. This argument was considered by the ECJ in *Gillespie*.<sup>117</sup> As a matter of pragmatic reality, the Court's decision to opt for the former argument is unsurprising. As a result of its decision, PD and ETD protection in terms of maintenance of income during maternity leave neatly dovetail.<sup>118</sup> This, however, takes nothing away from the criticism that both here and in the fixed-term contract exception, the Court is playing with the meanings of equality and discrimination in a manner which abuses the coherence of those concepts and the meaning the Court had given them in *Dekker*. In moving from *Dekker* to *Gillespie*, the Court flipped from stating that no comparison is necessary (pregnancy discrimination is sex discrimination) to stating that, where pay for maternity leave is concerned, no comparison is possible (women on leave are comparable neither with men nor women actually

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<sup>114</sup> *Caruana v. Manchester Airport plc* [1996] IRLR 378. The employers refused to renew the contract of a woman who had been employed on a series of fixed-term contracts when she told them she was pregnant. The EAT stated: 'The argument that the ruling of the House of Lords and that of the European Court does not apply to fixed-term contracts could not be accepted. Such a contention was not consistent with Lord Keith's limitation of a possible special rule for fixed-term contracts to cases where the employee would be available for no part of the term'.

<sup>115</sup> Rubenstein, 'Understanding pregnancy discrimination: a framework for analysis', 42 *EOR* (1992) 22 at 25-26.

<sup>116</sup> This is the position adopted by AG Darmon in his opinion in *Hertz and Dekker* [1991] IRLR 33 at paragraph 27, 'again we must emphasise that such a principle does not influence the ability of Member States to fix conditions regarding...the granting of payments for maternity leave. The two things are distinct.'

<sup>117</sup> Case C-342/93 *Gillespie and others v. Northern Health and Social Services Board and others* [1996] ECR I-475.

<sup>118</sup> See further Davies, 'The European Court of Justice, National Courts and the Member States' in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds) *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn* (Clarendon Press: Oxford, 1996) 95 at 127-130.

at work).

The difference between the distinction drawn between pay and other terms and conditions in the two EC Directives is that, in the PD, it is clearly and explicitly set out and accepted as a matter of political expediency, whereas to reach the same result under EC equality law, the ECJ presented their conclusion as conceptually ineluctable on the ground that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations.<sup>119</sup>

### 3.4 Preliminary assessment

As we have seen, in the UK and other Member States, much soulsearching and doctrinal debate has surrounded the issue of how to conceive of pregnancy and related issues in terms of equality. Given the problems using equality discourse to construct pregnancy protection has given rise to in the UK courts and the ECJ, the preferable path for reform in the UK is seen in the improvement and expansion of free-standing maternity rights. This path is preferred for a number of reasons, both theoretical and practical. Improved and simplified maternity rights, with universal coverage and uniform entitlements, are seen as providing greater clarity and consistency for pregnant employees. The SDA, by contrast, is viewed as an 'unreliable legal tool'<sup>120</sup> where solid legal precedents can quickly dissolve in myriad distinguishings. On the theoretical level, many feel that the anchoring of maternity rights in discrimination law weds it to the 'sameness/difference' debate in a way that involves the use of artificial comparisons and makes pregnancy rights a derogation from equality, a special right or preferential treatment.<sup>121</sup>

Hence, all of the rationales examined so far seem to be defective in one way or another as the sole basis upon which to base pregnancy regulation. Voluntarism and business efficiency informed

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<sup>119</sup> Paragraph 16 of the judgment.

<sup>120</sup> Lacey *supra* at n.86 at 45.

<sup>121</sup> See for example Fredman (1992) *supra* at n.67 at 134 discussing EC legal strategies, 'better to have draft directives containing specific rights...thus pregnancy attracts rights for its own sake rather than on the basis of artificial comparisons.'

pregnancy regulation by giving employers *carte blanche* to eliminate large numbers of pregnant woman from their workforce, and to give pregnant employees who fulfilled certain service requirements a bureaucratically riddled right to return, following a poorly financed absence from work to give birth. A health and safety rationale is problematic because it cannot capture adequately all of the issues which arise in pregnancy and maternity regulation. This leads to some important issues being excluded, others being awkwardly included and an inbuilt bias towards maintaining or increasing protection which may not always be appropriate when considering pregnancy and maternity regulation. Using equality legislation to construct pregnancy rights is also problematic. It is heavily reliant on the courts. As we have seen, they have redrawn the lines of when and with who comparisons can be drawn in order to provide often incoherent, ad-hoc and policy-driven solutions. These solutions have often downgraded protection and damaged the integrity of previous gains in their understanding of equality and discrimination by placing unwarranted limitations on the scope of these concepts. It is clear that asking courts to act as proxy legislators in the field of employment rights carries with it attendant dangers.

In France, by contrast, protection of pregnant employees has, until very recently,<sup>122</sup> been conspicuously absent from the employment equality debate. This is at least partially due to the fact that French legislation regulates pregnancy more adequately than UK legislation. Hence, the need to exploit sex equality provisions to construct pregnancy protection has not been so desperate.

Having learnt from our examination of the UK legislation that the mere assertion that a particular jurisdiction legislatively protects pregnancy and maternity fails to adequately gauge the value of that protection, we can turn - with cautious optimism - to a legislative model which bases itself on the rationale that the pregnant worker needs to be protected as a matter of labour law. Perhaps in the French model, we will find a way of conceptualising the pregnant worker and giving her rights which allows us to completely sidestep the problems which accompany the rationales of voluntarism, business efficiency, health and safety and equality. Perhaps we can, as Fredman suggests with regard to the equality rationale,<sup>123</sup> jettison or render marginal all other rationales and conceptualise the pregnant employee as one of many 'protected' categories of worker.

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<sup>122</sup> See now the Cour de Cassation reference discussed in Chapter 3 at n.249 and *infra* in Section 3.5.2.

<sup>123</sup> Fredman (1994) *supra* at n.2.

### 3.5 Protected worker rationale: France

In France (and most other Member States) implementation of the PD necessitated some changes and adjustments in the regulation of pregnant employees, for example the introduction of a clause on paid time-off for ante-natal care in the French system.<sup>124</sup> Apart from the ante-natal care provision, French law was in most respects in conformity with the Directive, and in many respects, is a vast improvement on the PD's provisions. The core of the French pregnancy and maternity regime was introduced in laws passed in 1975 and 1980.

#### 3.5.1 The legislation

The legislation will be examined in the same way as the UK legislation in order to facilitate comparisons. Some additional features will have to be included as the French legislation covers more areas than its UK equivalent.<sup>125</sup> Before examining the substantive content of the Labour Code's provisions, it is worth pointing out that there is a stark contrast between the brevity, simplicity and clarity of the French provisions and the tortuous complex maze of the British provisions.

Employers in France may not refuse to hire a woman because she is pregnant and the employer is prohibited from trying to ascertain - or getting others to ascertain - whether a woman is pregnant. Moreover a female job candidate or employee is not obliged to disclose her pregnancy - except where she wishes to benefit from the legislative provisions concerning the protection of pregnancy and maternity.<sup>126</sup>

The Labour Code states that no employer may terminate the contract of employment of an

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<sup>124</sup> Art.L.122-25-3 c.trav.

<sup>125</sup> Two very important areas covered in French legislation, and which are not addressed in the UK legislation or in the PD, are the provision of paternity leave and adoptive leave. An employee who is not giving birth, but whose partner is giving birth, has the right to three paid days leave - Art.L.226-1 c.trav. Adoption is for certain purposes assimilated to pregnancy and maternity regulation for the purposes of protection. These will be pointed out where appropriate in the text.

<sup>126</sup> Art.L.122-25 c.trav.

employee who is medically certified as pregnant. Having laid down this general principle, two specific exceptions are provided. The first is that an employer may terminate the contract of employment if such termination is justified by a *faute grave* on the part of the employee which is not linked to her pregnancy. The second is where the employer finds it impossible - for a reason not connected to the employee's pregnancy or maternity - to maintain the contract of employment. With regard to the former exception, it is important to note that this means that there are many situations in which it would be acceptable to dismiss a woman were she not pregnant which become unacceptable when she is pregnant or on maternity leave.

In general, French employers may dismiss an employee where a 'real and serious reason' exists. Prior to the adoption of the dismissal legislation in 1973, a 'minor' fault (*faute 'légère'*) on the part of the employee was sufficient for dismissal. As the 1973 legislation gave no definition as to what a 'real and serious reason' might be, it was unclear what degree of fault was necessary on the part of the employee to constitute such a reason. It would appear from case law that for ordinary dismissals, while a 'minor' fault is insufficient, an intermediate category of 'serious fault' lies between 'minor fault' and 'grave fault' which is sufficient to constitute a 'real and serious cause'. Despite the fluidity of these categories of fault in the hands of the judiciary, it is still important that 'serious' fault on the part of a pregnant employee will be insufficient to justify dismissal - a *faute grave* is required.<sup>127</sup> This compares favourably with both the UK provisions and the PD where a non-pregnancy related reason which would normally justify dismissal suffices in the same way to justify dismissal of a pregnant employee.

Moreover, even if an employer dismisses an employee for a 'serious fault' without knowing that she is pregnant, the termination is null<sup>128</sup> if within fifteen days from the day of its notification the employee concerned sends a medical certificate stating that she is pregnant to her employer.<sup>129</sup> These provisions do not prevent the coming to term of a fixed-term contract.<sup>130</sup>

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<sup>127</sup> See further G.Lyon-Caen and J. Pélissier, *Droit du travail* (Précis Dalloz: Paris, 1990) at 331ff.

<sup>128</sup> On the significance of 'nullity' see *infra* text accompanying n.143.

<sup>129</sup> The same protection is afforded to an adoptive parent who informs the employer within fifteen days of the dismissal that an adopted child is coming into the home within fifteen days: Art.L.122-25-2 c.trav.

<sup>130</sup> Art.L.122-25-2 c.trav.

Employers are also prohibited from relying on an employee's pregnancy to terminate her contract during a trial period or to move her from one job to another.<sup>131</sup> This does not, however, prevent the temporary relocation of a pregnant employee into another job on the initiative of either the employer or the employee, if her state of health requires it. Where it is the employer who takes the initiative, or where the employer disagrees with the employee on her need to be relocated, only the occupational doctor can decide whether relocation is necessary and to which post. A pregnant employee cannot be relocated to a job in another establishment without her permission. The employee is entitled to go back to her original job when her state of health permits. Relocation must not lead to any decrease in remuneration.<sup>132</sup>

There are no service requirements to avail of maternity leave. Notification requirements, in sharp contrast to the UK legislation, are confined to the provision that employees must notify employers of the reason for their absence and the date on which they intend to put the contract of employment back into force.<sup>133</sup>

Women have the right to sixteen weeks maternity leave, six weeks before the expected date of confinement and ten weeks after the birth.<sup>134</sup> Employers are prohibited from employing women for a total of eight weeks before and after confinement. In particular, it is forbidden to employ a woman six weeks after child-birth.<sup>135</sup> If the birth takes place earlier than expected, the woman is entitled to the whole period of leave (normally sixteen weeks) to which she would have been entitled. The length of maternity leave a woman may have is extended in a number of situations which reflect two types of public policy consideration: the health of the mother and child and natalist preoccupations.<sup>136</sup> More generally, the recognition that the arrival of children into the

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<sup>131</sup> Art.L.122-25 c.trav.

<sup>132</sup> Art.L.122-25-1 c.trav.

<sup>133</sup> Art.L.122-26 c.trav.

<sup>134</sup> Art.L.122-26 c.trav.

<sup>135</sup> Art.L.224-1 c.trav. Employers who flout this prohibition are subject to a fine under Art.R.262-7 (pén.) c.trav.

<sup>136</sup> For all the provisions on maternity leave, see Art.L.122-26 c.trav. The longest leave is reserved for women expecting more than two children. They are entitled to a total of 46 weeks leave: 24 before and 22 after the expected date of confinement. Women expecting twins are entitled to a total of 34 weeks: twelve before and 22 after the expected date of confinement. Women in this position can choose to increase the pre-birth leave by four weeks and

home requires a period of leave which must not be allowed to endanger the parent-worker's position on the labour market is acknowledged in the provisions dealing with adoption leave.<sup>137</sup>

What is the effect of maternity leave on the contract of employment in French law? It is made absolutely clear in the French legislation that the contract of employment is regarded as suspended during maternity leave. The notion of suspension is a technique used in various areas of French labour law to cover situations where either the employee is entitled not to provide work or the employer is entitled to refrain from providing work.<sup>138</sup> The consequences of suspension differ according to the right protected. In the case of maternity leave, suspension has a number of different and significant consequences. First, the employee is not obliged to work for the employer during the period of maternity leave to which she is entitled. Second, the period of suspension is assimilated to a period of actual work for the purpose of accruing entitlement to paid holidays.<sup>139</sup> The suspension period is also treated as a period of actual work for the calculation of rights linked to length of service in the enterprise.<sup>140</sup> Third, maintenance of income during the period of suspension is assured through the French social security system at a much higher level than that

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reduce the post-birth leave accordingly. Natalist considerations, which in France have traditionally focussed on the magical number of three children, can be seen in the extra maternity leave to which women who already have two children are entitled to: eight (or ten) weeks before the expected date of confinement and eighteen (or sixteen) after birth. The health of the mother can be seen in the extra maternity entitlement afforded to women with pathological pregnancies: a maximum of an extra two weeks before and four weeks after the birth. Finally, and once again in contrast to the UK and PD provisions, provision is made for when the baby born is ill following the birth. When the child born has had to remain hospitalized until the end of the sixth week after birth, the post-birth leave entitlement only begins to run on that day.

<sup>137</sup> Adoption leave is generally ten weeks from the day the child arrives in the home. This entitlement is increased to eighteen weeks where the adoption has the effect of bringing to three or more the number of children in the household and to 22 weeks in the case of multiple adoptions. Where both parents work, either can take the leave and receive the protection. Adoption leave can be divided between the two parents, on the condition that it is not divided into more than two halves, the shortest of which is four weeks. Adoption leave is assimilated to maternity leave for the purposes of protection.

<sup>138</sup> For this definition and discussion of the uses of the technique of suspension in French labour law, see Lyon-Caen and Pélissier *supra* at n.127 at 266ff.

<sup>139</sup> Art.L.223-4 c.trav. Similarly, absences for ante-natal care are assimilated to actual work for calculating paid leave entitlement; Art.L.122-25-3 alinéa 2 c.trav.

<sup>140</sup> Art.L.122-26-2 c.trav. For an example of a right which is linked to length of service in the enterprise, in turn calculated normally according to actual presence in the workplace, Lyon-Caen and Pélissier *supra* at n.127 cite the length of the notice period.



found in the UK. Employees on maternity leave receive a daily allowance equivalent to 84% of their basic pay. Because this allowance is not taxed, it often comes very close to the normal pay of the employee.<sup>141</sup> It is paid subject to two conditions: the payment can not exceed the (relatively high) social security ceiling<sup>142</sup> and the woman may not work during the period in which the benefit is paid.

The period of suspension for maternity leave is given a form of 'superprotection' against dismissal. As we saw above, dismissal of a pregnant woman at work is sanctioned by 'nullity'. This sanction also applies throughout the period of suspension. The sanction of nullity is reserved for certain types of dismissal in French labour law. It means that the dismissal, in principle, is of no effect and therefore that the employee can continue to hold her job.<sup>143</sup> Moreover, apart from this special sanction, the period of maternity leave is more highly protected than the period from the beginning of pregnancy until the commencement of leave. Irrespective of whether the employee has committed a *faute grave* or it is impossible to maintain the contract, termination of the contract may neither be notified to the employee nor take effect while she is on maternity leave.<sup>144</sup>

Nullity of the dismissal of an employee during the protected period is also subject to heavier financial penalties than employer liability for normal unjustified dismissals. The employer must pay the employee all the wages which would have been paid during the whole of the protected period, in other words, potentially from the first day of pregnancy until four weeks after the end of the maternity period. The employer may also be liable for the normal compensation payable for an unjustified dismissal. It is further provided that the court may award extra damages to the employee dismissed during the protected period on top of any normal dismissal compensation to

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<sup>141</sup> Art.331-1 c.sec.soc. Until 1982, the allowance was set at 90%. However, all public sector employees and all employees of enterprises who are parties to 'mensuelisation' agreements receive their full salary during the period of maternity leave: see Saurel-Cubizolles and Romito, 'Activités professionnelles et maternité en France et en Italie', 42 *Revue Française des Affaires Sociales* (1988) 93 at 105.

<sup>142</sup> On 1st January 1994 this was set at a daily maximum of 355.04 francs and a daily minimum (1/365 of invalidity pension) of 44.74 francs; see *Memo Social 1994* (Liaisons Sociales: Paris).

<sup>143</sup> Normally, an unjustified dismissal is not null, it merely gives rise to compensation.

<sup>144</sup> Art.L.122-27 c.trav.

which she may be entitled.<sup>145</sup>

The French Labour Code also has a number of provisions designed to accommodate the woman who returns to work while she is breastfeeding her child and the well-being of the child. Hence, women are entitled to an hour off work per day to breastfeed.<sup>146</sup> Employers of more than 100 women are required to provide specially equipped breastfeeding rooms.<sup>147</sup> The specifications of these facilities are set out in detailed regulations.<sup>148</sup> A doctor must visit once a week and the cost of these medical visits and the maintenance of the facility must be borne by the employer who may not ask for any contribution from the mothers and children who utilise the facility.

### 3.5.2 Judicial interpretation of the legislation

From looking at the British legislation, we have seen that statutory rights can look quite different when they are applied by the courts. Thus, before giving a qualified thumbs-up to pregnancy protection in France, judicial interpretation of the legislation must be examined.<sup>149</sup>

By and large, the French courts have faithfully and strictly applied the protection given to pregnant employees and employees on maternity leave. Hence, an employer who terminated the contract of a pregnant employee during the trial period was liable for damages for terminating the contract of a pregnant employee during the trial period, but not for wages which an employer is liable only to pay when the contract is terminated following the trial period.<sup>150</sup> The courts have viewed the notification requirements as a formal, rather than a substantive procedural requirement.

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<sup>145</sup> For sanctions relating to the protected period, see Art. L.122-30 c.trav. For compensation available for normal unjustified dismissals, see Art.L.122-14-4 c.trav.

<sup>146</sup> Art. L.224-2 c.trav.

<sup>147</sup> Art. L.224-4 c.trav.

<sup>148</sup> See Art. R.224-1 to Art. R.224-23 c.trav. Failure to comply with any of these obligations to accommodate the breastfeeding employee is subject to a fine under Art.R.262-7 c.trav.

<sup>149</sup> In order to do this, I have examined approximately seventy cases applying the pregnancy and maternity legislation. This covers all cases (reported and unreported) decided by the Cour de Cassation between 1993 and March 1997 and cases reported in *Droit Social* and *Droit Ouvrier*.

<sup>150</sup> Cass.Soc. 15 January 1997, *Dundas v. Banque Saint-Dominique*, Bulletin Civil.

Hence, where there is evidence that the employer knew of the employee's pregnancy, whether or not she has notified her pregnancy is irrelevant in determining the employer's liability for dismissal.<sup>151</sup> The *Cour de Cassation* has also ensured that dismissal during the protected period will only be justified if it is for *faute grave* or the impossibility of maintaining the contract for reason unrelated to pregnancy. Thus, the *Cour de Cassation* rejected the reasoning of a *Cour d'appel* which had dealt with the dismissal of a pregnant employee who had failed to move in accordance with the mobility clause in her contract. The *Cour d'appel* had decided that the dismissal - consequent on the employee's refusal to accept the proposed job - was justified as it was not connected to pregnancy. The *Cour de Cassation* rejected this on the ground that the lower court made no finding of either *faute grave* or impossibility.<sup>152</sup>

The *Cour de Cassation* has firmly rejected arguments that, as women receive substantial social security benefits during the leave period, these should proportionately reduce the amount of wages the employer must pay for dismissal during the protected period. It has consistently stated that the imperative provisions of L.122-30 allow for no restrictions.<sup>153</sup> Nor can an employer not pay a woman her paid leave entitlement for the period covered by nullity as it is assimilated to a period of effective work and therefore her rights to paid leave also accrue.<sup>154</sup> The *Cour de Cassation* has also held that absence on maternity leave cannot be counted as a sickness absence in order to justify dismissal of an employee.<sup>155</sup> The 'superprotection' of the period of maternity

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<sup>151</sup> See, for example, Cass.Soc. 24 October 1996, *La Résidence Montparnasse v. Mme Tarkia Herzli* (LEXIS); Cass.Soc. 20 June 1995, *Sté Sotranord Littoral v. Mme Martine Leleu*, Bulletin Civil. However, if the employer does not know of the employee's pregnancy at the time of dismissal and is not informed within 15 days, the woman loses the protection afforded to pregnant employees - Cass.Soc. 16 July 1996, *Mme Jocelyne Langlois v. Mme Jocelyne Herisson* (LEXIS).

<sup>152</sup> Cass.Soc. 22 May 1996, *Mme Catherine Mahaie v. Sté Le Logement Français* (LEXIS); on *faute grave* see also Cass.Soc. 21 June 1995, *Mme Fatiah Saboun v. Mme Carole Lugassy* (LEXIS) and Cass.Soc. 27 April 1989, *Mme Rossury v. Institut Dudouit*, reported in *Droit Ouvrier* (1990) 143. On 'impossibility', see Cass.Soc. 21 October 1996, *Mlle Roger v. Sté Boulrier* (LEXIS) and Cass.Crim. 24 October 1995, Bulletin Criminel.

<sup>153</sup> See, for example, Cass.Soc. 27 March 1996, *Sté Salons Cadet v. Mlle Corinne Verdun* (LEXIS).

<sup>154</sup> Cass.Soc. 10 November 1993, *Mme Schmitt v. Laline*, reported in *Droit Ouvrier* (1994) 239.

<sup>155</sup> Cass.Soc. 28 March 1996, *Mlle Elisabeth Lauth v. Sté Bourjois* (LEXIS). Here, the employee was absent from June 1987 on leave linked to pregnancy and maternity. Following this, she was absent from June 1988 until October 1988 due to sickness. The *Cour d'Appel* had accepted that her dismissal in September 1988 was justified by a real and serious reason as an absence more than fifteen months by this particular employee could not be other than damaging to the enterprise and rendered the action necessary. The *Cour de Cassation* rejected this finding as the absence of an employee on maternity leave may not be included in absences for sickness.

leave has also been upheld.<sup>156</sup>

Moreover, the *Cour de Cassation* has applied the pregnancy and maternity provisions to employees on short fixed-term contracts in two interesting decisions. These are evidently of special interest, given the apparent restriction of ECJ equality jurisprudence to those on indefinite contracts.<sup>157</sup>

In *Crédit Mutuel de Bretagne v. Menez*,<sup>158</sup> the employee had been engaged in December 1985 to replace an employee on sick leave. The employer terminated the contract early on the ground that the absence of the employee on sick leave had led to a decision to abolish the position. The appeal court found the termination both abusive and null, as the employee was pregnant. The employer challenged this before the *Cour de Cassation* on the ground that Arts. L.122-25-2 and L.122-30 were not applicable to fixed-term contracts, and that in condemning the employer to pay Mme Menez wages for the protected period, the appeal court had misapplied the legal provisions. The *Cour de Cassation* stated that the statutory protection regime does apply to employees on fixed-term contracts although it does not prevent the contract coming to the end of its term.

In the second case, Mme Geoffray had been engaged on 22 November 1985 on a fixed-term one year contract as a chemist to replace an employee on training.<sup>159</sup> On 7 January 1986, a doctor demanded a change of post for her because of her pregnancy. The next day, the employers told her that they considered the contract to be at an end because of *force majeure*. Following receipt of a medical certificate from the employee stating that she was three months pregnant, the employer stated that it was unprepared to change its decision. The *Cour de Cassation* refused to accept the employer's arguments that an employee who knowingly hides her pregnancy and

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<sup>156</sup> Cass.Soc. 10 May 1995, *Mme Marie-Claude Garin v. Sté anonyme Erom France*, Bulletin Civil. Here, the employee had been notified during the maternity leave period of her dismissal for *faute grave* with effect from her first day back at work. The Conseil de Prud'hommes had rejected the employee's claim for compensation on the ground that the dismissal only took effect at the end of the maternity leave and was for *faute grave*. This was rejected by the Cour de Cassation on the ground that L.122-27 stipulates that a dismissal - even for *faute grave* - cannot be notified during the maternity leave period.

<sup>157</sup> See *supra* Section 3.3.6.

<sup>158</sup> Cass.Soc. 10 November 1993, *Droit Ouvrier* (1994) 239.

<sup>159</sup> Cass. Soc. 2 February 1994, *Sté Vernis Valentine v. Mme Geoffray*, reproduced in *Droit Social* (1994) 512.

accepts a fixed-term contract as a temporary replacement while being aware that she will be unable to carry out the job for which she is applying commits a fraud on the law and should not be given the benefit of pregnancy and maternity protection. They stated that as the employee was not obliged, in application of L.122-25, to disclose her pregnancy, the appeal court had correctly decided that the employer could not break the contract without respecting the provisions on pregnancy and maternity protection.

There appear to be three areas where the court's handling of the French legislation has produced more dubious results. The first is that the statutory regime has been held to protect women only from dismissal against pregnancy or maternity inside the protected period. When this is over, women - even if they have been dismissed on pregnancy or maternity related grounds - are generally dealt with according to normal dismissal provisions.<sup>160</sup> The second concerns the remedies accompanying the special sanction of nullity for pregnancy-related dismissals. Many women have argued that reinstatement is a legal right consequent upon the nullity of a pregnancy-protection dismissal. The *Cour de Cassation* has consistently rejected this argument, stating that Art.L.122-30 does not attach an obligation to reinstate to the nullity of a pregnancy protected dismissal.<sup>161</sup> The third concerns the fact that the protection in the statutory regime is finite: it does not establish a general principle of protection. Rather it protects women in the ways detailed in the legislation. Hence, as we saw in Chapter 3, both Mme Duchemin and Mme Thibault challenged works rules provisions which did not count maternity leave as time spent at work, and therefore resulted in the two women not getting a staff report which was conditional on spending six months in the enterprise.<sup>162</sup> Neither women could avail themselves of the national pregnancy protection regime, as it only provides that time spent on leave will be counted as actual work for the purpose of acquiring certain specified rights. As we saw earlier, the *Cour de Cassation* made

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<sup>160</sup> See, for example, CA Paris, 8 October 1992, *Mlles Mazorra et Jimenez v. Sté Hotel Concorde Lafayette*, reproduced in *Droit Ouvrier* (1993) 255.

<sup>161</sup> See, for example, Cass.Soc. 30 January 1996, *Mme Elsa Lopes v. Sté Sodiarl*. For an interesting argument that Community law could be invoked here to argue that the remedy here must not be less favourable than the consequences attaching to other similar rights sanctioned by nullity in French law, see Masse-Dessen, 'La résolution contentieuse des discriminations en droit du travail: une approche civile', *Droit Social* (1995) 442 at 445.

<sup>162</sup> See Chapter 3 at n.249.

its first preliminary reference on EC equality law to the ECJ in the *Thibault* case.<sup>163</sup>

### 3.5.3 Collective bargaining on pregnancy and maternity

When we look at collective bargaining on this issue in France, the conservativeness of the British bargaining agenda is replaced by a range of provisions dealing with pregnancy and motherhood.<sup>164</sup> As we have seen,<sup>165</sup> all public sector employees and those subject to 'mensuelisation' agreements receive full pay throughout the entire maternity leave period. Apart from pay, the most common type of measure concerns the possibility for pregnant employees to reduce their daily or weekly working time<sup>166</sup> or to obtain breaks during the working day. Prior to the introduction of the statutory right to ante-natal leave in 1993, this was often provided for collectively. Pregnant women who normally carry heavy loads or work standing are often permitted to reduce the weights they carry and sit down more frequently.<sup>167</sup>

## 4. Rationales informing pregnancy regulation: perspectives and evaluation

There may seem to be something slightly incongruous in the fact that France, a country already possessing relatively high legislative standards, has also built further collectively on these. The UK, with low initial standards, premised on a model of improved protection provided through

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<sup>163</sup> Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés v. Evelyne Thibault*. AG D. Ruiz-Jarabo-Colomer gave his Opinion on 9 January 1997. He concluded, 'Art.5(1) ETD must be interpreted as precluding a national provision of contractual origin which provides in neutral terms that an employee who has been present in his/her post for at least six months will obtain a staff report from his or her superiors, but the practical application of which constitutes direct sex discrimination in that it allows the calculation of an employee's presence in his or her post through the French social security system to count maternity leave as a period of absence due to illness.'

<sup>164</sup> For further analysis of the treatment of pregnant employees legislatively and collectively in France, see Saurel-Cubizolles and Romito, 'Mesures protectrices pour les femmes enceintes au travail: des textes, une pratique, des besoins', 46 *Revue Française des Affaires Sociales* (1992) 49-65.

<sup>165</sup> *Supra* at n.141.

<sup>166</sup> 41% of pregnant women benefited from a reduction in working time in the Saurel-Cubizolles, Romito survey *supra* at n.164. For 65% of those benefiting from these reduced-hours provisions, the reduction was an hour or more per day.

<sup>167</sup> A very small number of employers in the UK also provide for longer rest periods, the possibility to work sitting down and allowing pregnant women to leave early. However, the point being stressed here is that these are isolated exceptions in the UK while they are much more wide-spread in France; see B. Cohen, *Caring for Children: Services and Policies for Childcare and Equal Opportunities in the United Kingdom* (CEC: London, 1988) 88.

collective bargaining, has largely failed to improve on these standards, and when it has, has done so in a way which reflects the 'business efficiency' model which also underpins the legislation.

However, looked at more closely, the differences between France and the UK are best seen as different public policy orientations, over a long historical period, towards the relationship of new mothers with the labour market. The rationales informing these very different approaches can be seen in their policy solutions in response to two crucial issues: the rise in infant mortality following increased employment of women in industry at the turn of the twentieth century and post-war labour shortages. Broadly speaking, France has chosen to focus on improving maternal welfare rather than discouraging maternal work whilst Britain has done the opposite.<sup>168</sup> Hence, in France, policy solutions have been taken with a view to protecting the welfare of children and of working mothers.<sup>169</sup> The *écoles maternelles*, which today provide 99% of childcare for 3-5 year olds were set up in 1887 with the explicit aim of providing care for the children of working-class parents while their mothers were at work.<sup>170</sup> In Britain, working mothers were viewed as the principal cause of infant mortality. Solutions, therefore, clustered around the removal of mothers from the labour market. Psychoanalytical opinions that mother-care was superior to any other form of care have held much stronger sway in Britain. The more comprehensive nursery structure existing throughout the UK during World War II was promptly dismantled following the war and, unlike France, when faced with labour shortages in the 1950's and 60's, efforts were not made to construct care facilities allowing more mothers to join the labour market full-time. Instead (male) Commonwealth labour was recruited to meet the labour shortage, while some participation in the labour market which would not interfere with the mother's primary caring responsibilities became

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<sup>168</sup> In 1909 the Engerand Law guaranteed women in France eight weeks leave before and after birth. In 1913 the Strauss Law prescribed obligatory leave of four weeks after reproduction and this was accompanied by a financial law granting a daily allowance to women on leave. See Cova, 'French feminism and maternity: theories and policies 1890-1918' in G. Bock and P. Thane (eds) *Maternity and gender policies: women and the rise of the European welfare states, 1880s to 1950s* (Routledge: London, 1991) 119.

<sup>169</sup> See Jenson, 'Gender and Reproduction: Or, Babies and the State', 20 *Studies in Political Economy* (1986) 17; Jenson, 'Paradigms and Political Discourse: Protective Legislation in France and the US before 1914', 22 *Canadian Journal of Political Science* (1989) 235; Koven and Michel, 'Womanly Duties: Maternalist Politics and the Origins of Welfare States in France, Germany, Great Britain and the US 1880-1920', 95 *American Historical Review* (1990) II 1076.

<sup>170</sup> See further Felix, 'Nursery Schools: a Quality Environment for 2-6 Year Olds' in *EC Network on Childcare 1993 Annual Report* at 35.

acceptable.<sup>171</sup>

These differences in public policy also help to explain a number of other features of French and British provision. First, it is clearly in line with the French model to accept - legislatively and collectively - the pregnant woman and the new mother as a worker. Second, the proliferation of female-specific legislative and collective provisions - the latter providing the basis for the condemnation in France by the ECJ in 1988<sup>172</sup> - also clearly fits within this public policy orientation.<sup>173</sup> From this perspective, the presence of further collectively agreed measures on these issues in France appears not as an anomaly, but rather as both the forerunner and the natural accompaniment of the high base standards laid down in the legislative model.

The problem in both the UK and France is that legislative and collective standards may be failing to match up with what women need on the labour market. France raises the problem of the 'non-acute' situation. In countries with an articulated, and seemingly adequate, system of protection for all pregnant employees, the need to develop a national, and, more frequently, a supranational, sex equality reflex is less pressing than in countries with poor legislative provision. The benefits of simple legislative provisions granting a universal protected period of leave with a high percentage of income replacement to pregnant employees are easy to see. The downside of such provisions is that little effort may be put into ascertaining how 'protected' the protected period actually is, and into constructing possible relationships between such provisions and sex

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<sup>171</sup> In 1900, 43% of two to four year olds in Britain attended primary schools - this was reduced to 17% by 1919; in 1945 there were more than twice as many nursery places as now: see *EC Childcare Network 1990 Annual Report* at 150ff; on the hold of psychoanalytic theories on motherhood in the UK in the post-war period, see Cohen (1988) *supra* at n.167.

<sup>172</sup> Case 312/86 *Commission v. France* [1988] ECR 6315. See Chapter 1 at n.30, Chapter 3 at n.192, Chapter 4 at Sections 5.1.3.2 and 5.1.3.3, *infra* Section 5.3.1 and Chapter 6 at n.41.

<sup>173</sup> Out of 307 national agreement, 80 contained 'female-specific' rights covering approximately 2.4 million employees. 52 national agreements in 1989 contained a female-specific right to take time off to care for a sick child. Following the ECJ judgment, the collective bargaining partners were given until 1991 to remove female-specificity from collective rights not related strictly to pregnancy and maternity: L. No.89-488, 10 July 1989, art.8. In 1991, 44 of the 52 agreements on female-specific child sick leave were still female-specific. Moreover, Jobert reports a new agreement signed since the 1989 law reserving 'sick child leave' to mothers or single fathers. French law still permits mothers under 21 two days off per year per child in their care (Art.L.223-5 c.trav). In 1991, none of the fifteen national agreements extending this right to all mothers had been revised. In total, only ten of the 80 national agreements had been revised by 1991. See A. Jobert, *Négociation collective et promotion de l'égalité en France*, April 1993, Rapport pour le Bureau International du Travail, at 21.



equality provisions. Until very recently, pregnancy has not been conceptualised as an employment equality issue in France. This illustrates yet again the importance national Art. 177 references may have in awakening interest in the equality dimension of national labour law provisions. Pregnancy cases, at both national and supranational level have been largely invisible in France. The combination of increasing interest by a certain small number of female French labour lawyers and a pregnancy reference by the *Cour de Cassation* has begun to open up the problems facing women in France in being able to effectively utilise their legislative rights to maintain their position on the labour market following pregnancy. It remains to be seen to what extent this recent flicker of interest will be sustained. It is clear, however, that there is much to be gained in France from a continuous dialogue between the statutory protection regime and sex equality provisions. The *Thibault* case clearly demonstrates how important this sort of dialogue can be.<sup>174</sup>

In the UK, by contrast, the scandalous nature of UK legislative pregnancy provision has driven those in search of solutions straight into the arms of sex equality provisions. This may explain the obsessive recourse in Britain to supranational developments in this area. The benefits of this systematic and continuing engagement are the construction of increasingly sophisticated arguments in attempts to understand and transform the content and boundaries of sex equality provisions. The negative side of this sex equality reflex is that it may slant the presentation of the debate on how to shape pregnancy regulation in directions which are not always productive. This slant seems to be reflected in a lack of sustained and critical consideration of what adequate pregnancy legislation might look like and takes on two different, but interrelated, manifestations. First, the conceptual acrobatics required to construct pregnancy rights from sex equality litigation acquire a momentum which makes the task of constructing, and attempting to make a legislative reality, pregnancy protection, seem mundane and unrewarding by comparison with the dizzying heights of preliminary references and the fascinating entanglements of British courts with provisions of European law. Secondly, those proposals which do urge legislative reform tend to either view it as an alternative to sex equality interventions or to leave the proposals as a vague unelaborated desire that new improved legislation will 'sort out' the current problems.

Yet, it is clear from our examination of EC legislation governing pregnancy, and the French and

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<sup>174</sup> *Supra* at n.163 and Chapter 3 at n.249.

British provisions in this area that sex equality provisions and substantive legislative pregnancy protection can, and should, remain intertwined. To cut off these connections is to risk, as in France, a failure to constantly monitor the content and operation of pregnancy provision or, as in Britain, a failure to set our sights any higher than the product of the latest twist in sex discrimination litigation.

To underline the importance of continually articulating equality with substantive provision, the last section of this chapter examines briefly how the post-birth period is regulated in France, the UK and the EC. It argues that the ECJ's consistent failure to evaluate regulation of this period in terms of equality constitutes a serious black hole at the centre of the Court's equality jurisprudence.

## **5. Beyond pregnancy: regulation of the post-birth period**

A child does not disappear on its date of birth. It is blindingly obvious that children will need to be cared for by someone from the day they are born and through the early months and years of life. Public policy and labour law regulation in this area obviously have a crucial role to play in determining how these care costs will be distributed - and the impact caring obligations may have on the parent's position in the labour market. Here, the focus is principally on the few years directly following child-birth.

### **5.1 Post-birth regulation in the UK**

This is depressingly easy to explain. When the twenty-nine weeks a mother with two years service may be entitled to run out, there is no legislative provision for either parent to take time off work to care for their child and retain the right to return to work. For seven of these 29 weeks the mother is entitled to SMP; the remaining 22 weeks are unpaid. On the statutory level, therefore, at a maximum of 29 weeks following the birth, parents must find a source of non-parental care for their child, attempt to arrange their working hours so that one of them will always be available to provide care or one of them must give up their place on the labour market. The most common UK employer measure to fill the care 'lacunae' in statutory provision is to provide extended or

enhanced maternity leave, often included as part of an equal opportunities package. Maternity leave of 52 or even 63 weeks is provided by certain private and public sector employers.<sup>175</sup> Other measures which may try to respond to the current failure of public policy to provide a range of care solutions are the possibilities some employers provide for parents to work part-time, to job-share, work from home and have term-time contracts. The state opt-out of regulating afterbirth childcare has devastating effects on women's position in the UK labour market and their income.<sup>176</sup>

## 5.2 Post-birth regulation in France

As we have seen, post-birth women-only leave is normally ten weeks. However, in some circumstances this can increase to 22 weeks.<sup>177</sup> Following this, three leave options are available for parents. First, within two months of the birth, a parent can terminate the employment contract without notice and the employer is placed under an obligation to preferentially re-engage the employee. The re-engaged employee preserves all rights acquired before going on leave.<sup>178</sup> Second, the employee may reduce weekly working hours by one fifth,<sup>179</sup> on condition that the employee has one year's service and that this reduction will not bring his or her working hours below sixteen hours per week. Third, the employee may take a period of parental leave (*conge*

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<sup>175</sup> For details of extended maternity leave in the UK, see Cohen *supra* at n.167 at 88 and 136. See also 567 *Industrial Relations Review and Report*, September 1994, 16, reporting the extension of maternity leave to 52 weeks by some UK food industry companies as part of a growing commitment to equal opportunities.

<sup>176</sup> Cohen, *supra* at n.167 reports that a mother of two in the UK still takes on average seven years out of the labour market. Brannen reports that in the six months following the birth of a child in the UK, 8% of women return to work full-time and 9% return part-time: 'Childbirth and Occupational Mobility: Evidence from a Longitudinal Study', 3 *Work, Employment and Society* (1989) 179. In the UK, 60% of mothers work less than twenty hours per week, while only 8% of mothers work more than thirty hours per week. More than three quarters of UK fathers of children under ten work more than forty hours per week and nearly one third work more than fifty hours per week. In sharp contrast, only 7% of French mothers work less than twenty hours per week, while fathers' working hours in France are among the shortest in the EC (just under half work less than forty hours per week). Figures taken from *Mères, Pères et Emploi 1985-1991* Commission DGV V/5787/93-FR.

<sup>177</sup> *Supra* at n.136.

<sup>178</sup> Art.L.122-8 c.trav.

<sup>179</sup> This measure is basically designed for and used by parents on Wednesdays, the closing day for schools.

*parental d'éducation*).<sup>180</sup> This takes the form of a suspension of the contract which runs initially for one year but can be renewed twice up a total leave period of three years. Employers must be notified of intention to take this leave at least one month before its commencement (where notification takes place during maternity leave) and in all other cases, at least two months before its commencement.<sup>181</sup> An employee cannot be dismissed or made redundant during the parental leave period for a reason which is connected to the taking of parental leave.<sup>182</sup> Since July 1994, an *allocation parentale d'éducation* (APE) is payable to parents who take parental leave and who already have one child in the household.<sup>183</sup>

### 5.3 Post-birth regulation at EC level

There is a tension and a warning which resonates throughout prescriptive suggestions for 'beyond pregnancy' reform. This is that there is a clear distinction to be drawn between perpetuating female disadvantage by refusing to recognise their difference and perpetuating ideologies of the 'natural' role of women as the primary child-carer and home-maker. The most frequent example given is that of 'mother-only' post-birth leave and parental leave. While the first is a legal strategy perpetuating stereotypes, the second is a strategy designed 'to challenge the ideology of motherhood and create a climate of shared parental responsibility.'<sup>184</sup> Parental leave is in fact the central plank of calls for legislative reform in the sphere of reconciliation of family and

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<sup>180</sup> For both the second and the third forms, see L.122-28-1 c.trav. Parental leave was introduced in France in 1977. Until 1984, it was 'mother-only' leave. Until 1994, employees who worked in enterprises employing less than 100 employees could only take parental leave with employer consent.

<sup>181</sup> The period of parental leave is counted as half time for the purpose of seniority-linked rights. The employee preserves all such rights accrued before going on leave: Art.L.122-28-6. Employees are normally bound to be absent for the period of parental leave or four fifths working to which they have committed themselves. However, if the child dies or the household suffers a substantial reduction in resources they have, on giving the employer one month's notice, the right to return to their job or to their normal contractual hours early: Art.L.122-28-2 c.trav.

<sup>182</sup> See for example Cass.Soc.7 October 1992, *Sté Angers Beaucoze v. Dame Cottenceau*: the employer - which had to cut its workforce by 28 - was condemned when it made three employees on parental leave redundant by application of the sole criterion of 'presence at their place of work as management wish to prioritize the continuing employment of those making a real contribution to production'; see further Corrigan-Carsin, 'A propos du congé parental d'éducation: portée de la suspension légale du contrat de travail', *Droit Social* (1993) 728.

<sup>183</sup> Full APE (around £300 in 1994) is payable where the parent ceases all employment activity. Graduated reduced rates of APE are payable where the parent works a certain number of hours per week. Before 1994, APE was only payable on the third child.

<sup>184</sup> Conaghan and Chudleigh, *supra* at n.7 at 144.

professional life in the UK.<sup>185</sup>

One can have little argument with the general proposition that - where there are two parents - both should be able to care for their child without losing their place on the labour market. However, this does not help us very much in trying to answer two more interesting and difficult questions. The first is when does mother-only post-birth leave stop being necessary protection and start bring stereotypical and discriminatory? The second is to ask in what sense does parental leave enable both parents to take time off the labour market in order to care for their children? If we look at these questions in the light of Community law, some interesting light can be shed on the issue of both 'maternity' leave and 'parental leave'.

### 5.3.1 Post-birth mother-only leave

As we have seen, the ECJ's decision in *Hertz* has been severely criticised for not protecting women *enough* in the post-birth period.<sup>186</sup> Let us now turn to look at two decisions where the ECJ has, by contrast, been slated for protecting women in the post-birth period *too much*.

In *Commission v Italy*,<sup>187</sup> the Court was asked whether the grant of a paid women-only three month leave on the adoption of a child under six years of age contravened the ETD. The Italian government argued that as this provision was a simple extension of the rights given in the event of maternity to the case of adoption, it could not be considered as a working condition in the sense of Art.5 ETD, but rather fell under Art.2(3) which permits provisions concerning the protection of women, particularly as regards pregnancy and maternity. AG Rozès, considering that the leave was for the benefit of the child rather than for the mother (who had not given birth), felt that maternity leave and adoptive leave were not of the same nature. While leave following childbirth was to allow the mother to rest and could rightly be regarded as a provision to protect

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<sup>185</sup> See, for example, Fredman (1994), *supra* at n.2 who states at 123, 'the starting point, then, is the basic recognition of parenting as a social issue...this, in turn, demands parental leave...' and Conaghan and Chudleigh, *supra* at n.7 at 144, 'the way forward lies not by focusing on motherhood but by emphasising parenthood'.

<sup>186</sup> See *supra* Section 3.3.4.bis.

<sup>187</sup> Case 163/82, [1983] ECR 3273.

women in relation to maternity, adoption leave was predominantly for the child's benefit. Therefore, mother-specific adoption leave constituted a breach of the directive which could not be saved by Art.2(3), and adoptive fathers should be entitled to it on the same basis as their working wives. The Court disagreed with the AG and agreed with the Italian government, stating that mother-only leave was justified by the need to assimilate as much as possible the entry of the child into the family to those of the arrival of a new-born child during the initial delicate period.

In *Hofmann*,<sup>188</sup> a German father challenged the conformity of a mother-specific leave with the ETD. The German legislation provided for two different periods of leave. The first period was compulsory post-birth leave for the mother and covered a period of eight weeks from childbirth. The second period was also mother-specific, but optional, and covered the period between the end of the compulsory leave and the day on which the child reaches six months. During this period, the mother received a state allowance and was guaranteed the right to return to her employment on the same conditions. Ulrich Hofmann took leave during this second optional period, but was refused the daily allowance on the grounds that he was not the mother.

Hofmann argued before the Court that Art.2(3) ETD did not apply to such leave when it extended beyond the twelve weeks following the birth of the child. He argued that the optional nature of the leave, the fact that it was withdrawn in the event of the child's death and that it was only available to women who had fulfilled service requirements prior to the birth clearly demonstrated that the leave was not intended to meet the biological or medical needs of the mother, but rather to meet the interests of the child. The protection of the mother from the multiplicity of burdens imposed by motherhood and employment could best be achieved by non-discriminatory measures, such as a period of parental leave, thus giving the father the option of caring for the child and the mother the option of resuming employment when the compulsory maternity leave came to an end.

The Barmer Ersatzkasse and the German government argued that evidence exists that mothers do not recover from the physical and psychological changes caused by the birth by the end of the post-natal leave of eight weeks, but only some months thereafter. As the effects of pregnancy and childbirth become increasingly diverse as time goes by and the duties involved in caring for

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<sup>188</sup> Case 184/83 *Hofmann v. Barmer Ersatzkasse* [1984] ECR 3047.

a child vary widely from case to case, the legislature - in providing optional leave - deliberately left the choice up to the individual mother. The Commission argued that, while Art.2(3) is clearly designed to allow Member States to maintain or introduce provisions protecting women in relation to the period encompassing pregnancy and childbirth, a national rule which is described as providing for the protection of the mother may not *ipso facto* fall within the scope of that derogation which covers only those provisions which serve objectively to protect the mother and in which the reference to sex is a necessary condition for ensuring the desired protection. A sex-based distinction designed to allow only the mother to care for the child is not permissible within Art.2(3).

The Court accepted the argument that the granting of this period of leave to mothers-only fell within Art.2(3) and thus did not contravene the ETD. Its reasons for this decision were three-fold. First, Art.2(3) envisaged not just the protection of the mother's biological condition during or after pregnancy until such time as her physiological and mental functions have returned to normal, but also of the special relationship between a woman and her child which may be disturbed by the multiple burdens which would ensue from simultaneous pursuit of employment. Second, the ETD was not designed to settle questions concerned with the organisation of the family or to alter the division of responsibility between parents. Third, the Directive leaves Member States with a discretion as to the social measures which they adopt to guarantee the protection of women in connection with pregnancy and maternity and to offset the disadvantages which women, by comparison with men, suffer with regard to the retention of employment. Member States enjoyed a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation.<sup>189</sup>

Rather than devoting ourselves exclusively to saying that *Hertz* does not protect enough, whilst *Hofmann* and *Commission v. Italy* protect women too much, it is much more interesting - if

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<sup>189</sup> *Commission v. France supra* at n.172 may seem to indicate some movement by the Court towards a stricter interpretation of Art.2(3). It is true that this decision represents a development in the Court's reasoning in so far as, in their judgment, they exclude from the scope of Art.2(3) special rights relating to 'the protection of women in their capacity as older workers or parents - categories to which both men and women may belong'. This would seem to indicate that at some point in a child's development Art.2(3) ceases to apply. However both AG Slynn and the Court make it clear that the demarcation of Art.2(3) in *Hofmann* still stands; therefore provisions protecting the mother's biological condition and her 'special relationship' with the child are not affected by the ruling.

disturbing - to see what unites these decisions. It is inadequate to state that motherhood is protected *too much* or that *Hertz* provides insufficient protection without confronting the issue of how much is too much and how much is enough and without delineating more precisely what conditions or periods should be protected, for how long and for what reasons. Vague appeals to motherhood, parenthood or the continuing effects of pregnancy do little to resolve or clarify these difficult decisions.

Herein lies the common problem with the Court's approach in these cases. The Court refuses to explore the content and implications of 'maternity leave', 'protected periods' and other legislation affecting the division of mothers' and fathers' time between care work and market work. Thus in *Hertz*, it stated,

It is a matter for each Member State to fix the period of maternity leave in such a way as to allow female workers to be absent during the period during which problems due to pregnancy and confinement may arise.<sup>190</sup>

In *Hofmann*, as we saw above, this discretion argument was combined with the statement that the ETD was not designed to settle questions concerned with the organisation of the family or to alter the division of responsibility between parents. This means that the Court is, in effect, doubly 'blind'. First, if a Member State decides to call something maternity leave, the Court will not scrutinise the content or length of the leave. Secondly, if the Court has to make a decision on a particular rule, it will not examine the implications of the maintenance, modification or removal of this rule for the organisation of the family or the division of responsibility between parents.<sup>191</sup>

What are the problems associated with the Court's refusal to investigate how long the protected period should be and to investigate the consequences for organisation of the family of particular measures? The first is that no investigation can be made of whether different types of protected

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<sup>190</sup> Paragraph 15 of the judgment.

<sup>191</sup> See, for example, Case 170/84 *Bilka-Kaufhaus v. Weber Von Hartz* [1986] ECR 1607 which held that Art.119 does not have the effect of requiring an employer to organise its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such a pension: paragraph 43 of judgment. Similarly, *Hofmann* was invoked in Case 345/89 *Sioeckel* [1991] ECR I-4047 to avoid examining the argument that modification of female night work regulation would have an adverse impact, given the double burden of care and market work women shoulder: paragraph 17 of judgment. See further Chapter 6.



periods are needed for different types of pregnancy. Ms Hertz needed protection for two years after the birth of her child. If Member States gave each woman two years post-birth or maternity leave, would this be an adequate response? Surely, this is an over-inclusive measure while current maternity leave in all Member States is underinclusive for the *Hertz* situation. All types of leave in the post-birth period do not have to be labelled as either maternity leave or parental leave. For example, under Italian law, while maternity leave lasts twelve weeks after the birth, dismissal of a woman on grounds related to pregnancy is outlawed for twelve months after the birth. While this would not have captured Ms Hertz's situation, it is this type of provision which is most promising. If there are a range of known post-confinement complications which last beyond the maximum female-specific post-birth leaves in all Member States (and the longest is 29 weeks), these can be regulated either on a health and safety basis or on an equality basis by saying that it is forbidden to dismiss a woman suffering from these symptoms. To mask these in sick leave, maternity leave or parental leave provisions misses the point.

The second problem with failing to look inside maternity leave is that no maxima can be placed on its length. This is less easily resolved on a health and safety basis, as the Pregnancy Directive aptly illustrates. That this is an equality issue can be demonstrated by imagining that the Hofmann couple are UK citizens. Mr. Hofmann wanted to have paid leave in the 12-24 week period after the birth of his child. In the UK, which, at 29 weeks, has by far the longest period of mother-only leave in the EC, all of this period is swallowed up by maternity leave. Furthermore, if Mr. Hofmann's partner was employed by certain public or private sector companies in the UK, she could have the right to up to 63 weeks maternity leave. Periods of extended maternity leave are often presented as a type of positive action. The EOC has rightly questioned whether leave of this length can be considered as maternity leave. Looking at post-birth maternity leave in most countries, particularly following the implementation of the PD, the failure by the Court to consider how long maternity leave should be is also blind to legislative provision in almost all Member States. In four countries of the EC, the maximum normal post-birth maternity leave<sup>192</sup> ranges from

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<sup>192</sup> Excluding extra weeks for multiple births, premature births or pathological pregnancies which are allocated extra weeks of leave in some countries.

six to eight weeks<sup>193</sup>; in ten countries it lies between ten and fourteen weeks<sup>194</sup> and in the UK 29 weeks. Bar the UK, the maximum normal length of post-birth mother-only leave in the EC hovers around 14 weeks.<sup>195</sup> Recognition of this by the Court would clarify considerably regulation of the post-birth period, allow situations such as that in *Hertz* to be regulated adequately, but separately, and give the Court a clearly defined operating space to critically evaluate whether an extension of this period is appropriate in other situations. For example, the French provisions giving six extra mother-only weeks of leave when the pregnancy brings the number of children to three or more would perhaps be better classified as a period of parental leave attracting the same income maintenance as maternity leave.<sup>196</sup> Even more important than the legislative provisions, however, is the often considerable extension to post-birth mother-only leave by employers or the collective bargaining partners. Surely even *Hofmann* could not sanction a 63 week post-birth mother-only leave.

### 5.3.2 Parental leave

We have seen that the ECJ has steadfastly refused to confront the issue of how long maternity leave should be. As a result it has opted out of using equality to evaluate the effects of leave packages and other legislative provisions on the division of responsibilities between parents. Yet, the social partners at European level have acted on parental leave and the agreement reached has created the first Directive to have successfully passed through the social dialogue route in the Agreement on Social Policy.<sup>197</sup> It seems that everyone will have parental leave except the UK.

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<sup>193</sup> Sweden, Austria, Luxembourg and Germany.

<sup>194</sup> France, The Netherlands, Belgium, Denmark, Greece, Portugal, Italy and Finland. In Spain, the total leave is sixteen weeks. However, it is highly probable, given this total leave length that post-birth leave is a maximum of fourteen weeks. Similarly, in Ireland fourteen weeks total leave (pre- and post-) is the norm with four extra weeks being granted on the mother's request.

<sup>195</sup> Information on length of maternity leave is taken from European Commission Network on Childcare and other Measures to Reconcile Employment and Family Responsibilities, *Leave Arrangements for Workers with Children: A review of leave arrangements in the Member States of the European Union and Austria, Finland, Norway and Sweden*, V/773/94-EN (accurate as of November 1994).

<sup>196</sup> *Supra* at n.136.

<sup>197</sup> Agreement reached under the Art.3 and Art.4 consultation procedure in December 1995. The agreement, in accordance with Art.4(2) ASP became Directive 96/34 EC, OJ/L145 (3.6.1996). To a large degree, the Directive's content (that is, the Agreement) reproduces the unadopted proposal for a Parental Leave Directive which had been

Perhaps for this reason, the very term 'parental leave' has appeared in the UK to be a panacea for its regulatory ills in this area. But a comparative and EC level perspective has the merit of demonstrating that, just as 'maternity leave' conceals a wide range of very different types of leave, so too does 'parental leave'. A highly remunerated or non-transferable period of leave is a completely different right from a lowly remunerated right to be absent from the labour market. At present, the term parental leave covers a range of provisions which are *de facto* measures which encourage mothers to, at least, temporarily exit the labour market. In West Germany, 95% of mothers move onto low paid parental leave following the birth. In France however, the take up of APE is much more limited. The explanation for this different pattern is very simple. France has also provided a extensive public child care system which is completely absent in (West) Germany.<sup>198</sup> The example of Sweden - where parental leave is highly remunerated - shows us that getting fathers to take time off work to care for children is not a goal that will be achieved in the short term and will require sustained and imaginative statutory support if it is ever to be achieved.<sup>199</sup> In this context, the parental leave provisions in the Parental Leave Directive and in many Member States are, as a matter of empirical reality, low paid mother-only leave in everything but name. Only a mixture of institutional child care and adequate income replacement for parental leave periods will ensure that women are not unduly penalised in the post-birth period.

This is not to argue that equality laws or judicial rulings can (or should) be employed to *create*

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blocked in the Community legislative process since 1983.

<sup>198</sup> Fagnani, 'L'allocation parentale d'éducation en France et en Allemagne: une prestation - deux logiques', in *Entre la vie professionnelle et la vie familiale*, Recherches et Prévisions No.36 (CNAF: Paris, 1994) 49. Only half of eligible French mothers ask for this benefit as compared to 95% of West German mothers who benefit from the *Erziehungsgeld* (the equivalent German benefit paid at DM 600 per month for 24 months after birth). Fagnani explains this by pointing to the alternative sources of care for pre-school children in France and West Germany. In West Germany 3% of children under three are in state crèches compared to 20% in France. Between the ages of three and six, 65% of West German are in crèches compared to 95% of French children. See further Fagnani, 'L'allocation parentale d'éducation: effets pervers et ambiguïtés d'une prestation', *Droit Social* (1995) 287. On Germany, see further Schiersmann, 'Germany: Recognising the Value of Child Rearing' in S.Kammerman and A. Kahn (eds) *Child Care, Parental Leave and the Under 3's: Policy Innovation in Europe* (Auburn House: Westport CT, 1991).

<sup>199</sup> Sweden was one of the first countries in Europe to establish statutory rights to parental leave (in 1974). Leave may be taken for a period of up to eighteen months per parent. Leave is paid at 80% of earnings for one year (75% from 1996). Although almost all men take paternity leave and almost half of fathers take some leave during the child's first year, in total only 7.4% of all Parental Leave days taken are accounted for by fathers. See further *Leave Arrangements for Workers supra* at n.195.

periods of maternity or parental leave or oblige employers or legislatures to build creches. It does mean, however, that equal treatment laws, as interpreted by courts including the ECJ, could and should play a central role in *evaluating* the equality effects of the particular packages adopted by Member States. This is of increasing importance given the fact that most Member States now have both maternity and parental leave provisions. The terms 'maternity leave' and 'parental leave' can cover a wide range of very different provisions. The textual instruments to scrutinize more closely the length and content of post-birth leave provisions exist. The ETD outlaws discrimination on grounds of family status and discrimination on grounds of sex. While the Court continues to abstain from using these provisions to regulate post-birth leave, a black hole exists at the centre of European equality law and critical assessment of the equality implications of current provisions or suggestions for future reform is less likely to take place.

## Chapter 6

# The Female Night Work Ban: Interactions with Equality Conceptions and Employment Regulation

### 1. Introduction

The historical episode of specific regulation of female industrial night time employment in Europe - spanning a century and a half<sup>1</sup> - is coming to a close. Before the millennium arrives it is unlikely that bans on night work will be sex-differentiated in any EC Member State. So why look at something which appears to be of merely historical interest? One reason is that the last stages of the night work battle are still being fought, in particular between the Community and some Member States. Secondly, the removal of specificity in female night work regulation does not mean that female night work is similarly regulated in the EC Member States. Thirdly, this debate provides us with a mine of material for examining patterns of employment regulation, deepening our analysis of formal and substantive equality and, in particular, our comparative analysis of the meaning attributed to, and the content of, these equality conceptions. Given its long and contested history and the complex mosaic of overlapping contexts into which the night work ban fits - or rather has been placed by proponents of a certain position for the night work ban - here it is often difficult to see the wood for the trees. The issue of female night work regulation has been pressed into service in a bewilderingly wide range of arguments and contexts.

Thus, the female night work ban has been represented both as the first vital step on the path towards regulation of hours of employment for all, either legislatively or collectively, and as evidence that women's hours of work have been, and continue to be, regulated separately. Women have been kept in inferior employment positions and forms; with the pill being sweetened by telling them that they are 'pioneers' of new types of working and new forms of social

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<sup>1</sup> In the UK the first legislation on female night work appeared in 1844 (An Act to amend the Laws relating to Labour in Factories, 7 & 8 Vict., c.15) in France in 1892 and at international level in ILO Convention No.4 (1919). See further, Ramm, 'Laissez-faire and State Protection of Workers', in B. Hepple (ed.) *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (Mansell, London, 1986). Parts of this chapter, in particular, Sections 4.3. and 4.4. draw heavily upon Kilpatrick, 'Production and Circulation of EC Night Work Jurisprudence', 25 *ILJ* (1996) 169.

protection.<sup>2</sup> For some, female night work regulation is an important substantive protection in labour law, and an important acquisition of a health and safety right. For others, it is one of the strongest and most explicit signs that labour law is gendered. Some claim that female night work regulation has been the corner-stone of occupational segregation; others retort that it is mechanical and simplistic to attribute to protective legislation a significant role in creating occupational segregation. The retention of female-specific legislation is argued in some quarters to be incompatible with sex equality while for others its removal from the statute book is an endorsement of the worst kind of formal equality and a denial of substantive equality. It is argued that female night work legislation is an anachronism, protecting few women in a rapidly diminishing sector of the labour market and so riddled with exceptions as to be devoid of any practical impact. But it is counterclaimed that the problems of the double burden of domestic labour and paid labour and of the increased risks of sexual attack at night for women are by no means anachronistic and that female night work legislation, even with the possibility for exemptions, provides an important series of procedural controls and substantive protection for the significant number of women still working in areas covered under the night work ban.<sup>3</sup>

The chapter examines the following sets of issues. Section 2 compares the differing levels of institutional mobilisation on the night work ban issue in France and the UK. This is the only equality issue on which there has been a much higher level of institutional mobilisation and doctrinal debate in France than in the UK. To investigate how and why this occurred, I start by outlining the shape of female-specific employment regulation in France and the UK prior to the introduction of equal treatment norms. Section 2 then examines the discourses in both jurisdictions on the compatibility of female-specific regulation with equality when equal treatment laws were introduced. It is argued that while no changes were made to female night work regulation in either country on the introduction of equal treatment laws, very different equilibria lay behind non-removal in each case.

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<sup>2</sup> Contrast Chambelland-Liébault, 'Durée du travail, législation française d'hier: les femmes au travail, un laboratoire d'essai', *Workshop: The Historical Construction of Work Time*, European Forum, 1994-95, Gender and the Use of Time, (EUI: Florence) with Junter-Loiseau, 'Innovation ou inégalités temporelles? Des textes aux allures équivoques', presented at *Conference: The Regulation of Working Time in the European Union: Gender Approach*, European Forum 1994-95, Gender and the Use of Time, (EUI: Florence).

<sup>3</sup> See *infra* Section 6.

Section 3 argues that these different perspectives on the relationship between equality, employment regulation and a night work ban become even more starkly apparent when subsequent legislative activity is examined. The summary removal of female-specific regulation in the UK is examined, and compared with legislative efforts to modify the night work ban in France. To compare and contrast more effectively different legislative models of regulating female night work, we include in our focus the Italian model which adopted a rather different vision of how the relationship between equal treatment norms and female-specific regulation could be conceived.

While the UK effectively closed the chapter of female-specific night work regulation at this point, it was only the beginning of a still uncompleted saga in France and other Member States. Section 4 examines the role of courts in constructing and mediating conflicts between female night work regulation and equal treatment norms.

Section 5 looks at effects outside the courts of developments in the relationship between female-specific night work regulation and an equal treatment norm. It examines the institutional conflicts between the ILO, the EC and the Member States created by different perceptions of the relationship between female night work regulation, equal treatment norms and employment regulation. It considers the argument that countries which have abandoned protective legislation are often perceived as more advanced in equality terms. It argues that it is at least as important to classify countries on the basis of the *outcome* of a decision that an equal treatment norm and female-specific regulation are incompatible.

Section 6 analyses to what extent this *outcome* is reflected in or influenced by doctrinal evaluations of female night work regulation in terms of equality. It is argued that the extent and content of doctrinal coverage of the female night work issue is intrinsically linked to the meanings given to formal and substantive equality and that the meanings of formal and substantive equality are context-dependent. In particular, it is argued that the extent of articulation between doctrinal conceptualisations of labour law and doctrinal conceptualisations of sex equality constitutes a crucial explanatory element in analysing the extent and content of doctrinal evaluations of female night work regulation. Doctrinal analyses of female night work regulation in the UK, France and

Italy are examined to demonstrate this contention and to provide a basis for considering new ways of understanding the relationship between sex equality and employment regulation in the context of female night work regulation.

## **2. The introduction of equal treatment laws and female-specific employment regulation: the process of justification**

Even the proverbial ostrich would have found it difficult to miss the debate on the night work ban in France. A rich palette of legal forms and norms, including preliminary references, has informed the debate on the relationship between female-specific night work regulation and an equal treatment norm. By contrast, even an ostrich with its head completely out of the sand and with a higher than average interest in equality law would have found it difficult to discern and follow the course of the abolition of protective legislation in the UK. As Lewis and Davies remark, 'the protective legislation debate of the 1980s was... hard to find and difficult to follow.'<sup>4</sup> This section traces the different trajectories of debate in France and the UK on the same issue - whether a night work ban on female industrial employment was compatible with an equal treatment norm - to begin to discover why the debate was directed so differently in both countries and along what lines the debate was conducted.

### **2.1 The legal framework of female-specific employment regulation**

Before examining the fate of female-specific employment regulation in the UK and France we need to briefly outline the system of regulations and provisions which were in force before the introduction of equal treatment norms. These can be conveniently divided into firstly, hours of work regulation and secondly, other types of female-specific employment regulation, including (but not confined to) the regulation of reproductive hazards in the workplace.

#### **2.1.1 Hours of work regulation**

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<sup>4</sup> Lewis, Davies, 'Protective Legislation in Britain, 1870-1990: equality, difference and their implications for women', 19 *Policy and Politics* (1991) 13 at 20.



Before the introduction of sex equality legislation, sex-specific hours of work regulations in the UK were found in the Factories Act 1961 Part VI, the Hours of Employment (Conventions) Act 1936, the Mines and Quarries Act 1954, the Baking Industry (Hours of Work) Act 1954 and in regulations and orders made under these Acts.<sup>5</sup> The regulatory system was organised as a series of ground rules on working time which had to be posted and adhered to by employers<sup>6</sup> and which could then be the subject of either exceptions, exemptions and authorisations; exceptions merely requiring notice to be given to the Health and Safety Executive (HSE) and exemptions and authorisations requiring the HSE's permission. Women were prohibited *inter alia* from working more than a 48 hour week or a nine hour day, from starting before 7am or finishing after 8pm, from working on Sunday,<sup>7</sup> from working at night<sup>8</sup> and provision was made for rest and meal-breaks.<sup>9</sup> All of these ground rules were subject to derogations, varying as to the scope, means of obtainment and duration of the derogation. To give just a few examples: managerial posts were excluded from the operation of Part VI of the Factories Act,<sup>10</sup> double-day shifts could be permanently authorised by the HSE provided a majority of the workpeople concerned voted in a secret ballot for its introduction<sup>11</sup> and exemptions from the night work and the Factories Act provisions could be granted by the HSE where it considered that 'it is desirable in the public interest to do so for the purposes of maintaining or increasing the efficiency of industry or transport'.<sup>12</sup>

The only piece of male-specific hours of work regulation was found in the baking industry. The

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<sup>5</sup> For a comprehensive list of all the sex-specific primary and secondary hours of work legislation see *Health and Safety Legislation: Should we distinguish between men and women?* (EOC: Manchester, 1979) at 138-139.

<sup>6</sup> S.88 Factories Act 1961.

<sup>7</sup> S.93 Factories Act 1961.

<sup>8</sup> S.1 and Part 1 of Schedule 1 of the Hours of Employment (Conventions) Act 1936. Night is defined as a period of at least eleven consecutive hours, including the period between 10pm and 5am.

<sup>9</sup> See for all three s.86 Factories Act 1961; for Mines and Quarries see the almost identical provisions in s.125 of the 1954 Act.

<sup>10</sup> S.95 Factories Act 1961.

<sup>11</sup> See ss.97 and 98 of the Factories Act 1961.

<sup>12</sup> S.117 Factories Act 1961.

Baking Industry (Hours of Work) Act 1954 was introduced to prevent permanent night work in bakeries. It prohibited the employment of male workers between 6pm and 6am for more than 26 weeks a year or for more than four consecutive weeks at a time. Where an agreement was in force between employers and trade unions in the industry the Secretary of State could make an Order exempting the workers covered by the agreement from the Act's provisions. Women were not addressed in this piece of legislation as female night work in the baking industry was already regulated by the Hours of Employment (Conventions) Act 1936. The EOC recommended in their 1979 report the extension of this Act to women.<sup>13</sup>

In France, at the time of the passage of the 1983 law,<sup>14</sup> a similar set of female-specific hours of work regulations existed. While the ground rules were similar, the possibility of derogating from these ground rules was much more tightly circumscribed in the French provisions. Thus, women were forbidden to work on legally recognised holidays;<sup>15</sup> to work more than ten hours a day;<sup>16</sup> and to be employed on continuous work. The general right to a weekly rest<sup>17</sup> could be derogated from for men in certain circumstances but not for women or those under eighteen.<sup>18</sup> Special rules on working time laid down for specified industries could be derogated from in a number of ways enumerated in the decrees setting out these rules for male, but not for female workers.<sup>19</sup> A woman could not work outdoors after 10pm if a doctor deemed this prohibition necessary.<sup>20</sup>

Female night work was governed by Art.213 of the Labour Code. The basic prohibition was

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<sup>13</sup> See *supra* n.5.

<sup>14</sup> See Chapter 1 at n.23.

<sup>15</sup> Art. L.222-2 c.trav.

<sup>16</sup> Art.L.212-9 c.trav. This had to include a break of at least one hour; Art.L.212-10 c.trav. specifies that these breaks must be taken by female employees at the same time.

<sup>17</sup> Laid out in Art.L.221-12 and Art.L.221-13 c.trav.

<sup>18</sup> Art.L.222-14 c.trav.

<sup>19</sup> See Decrees of 27 October 1936 and 17 November 1936 taken in application of Law 21 June 1936; 170 of each decree differentiates between women and men for the purpose of the scope of derogations from the rules set out in these decrees.

<sup>20</sup> Art.R.234-4 c.trav. This prohibition is absolute for pregnant women.

subject to much fewer exceptions or exemption procedures than in Britain. Night was defined as the period between 10pm and 5am, although a 1982 law introduced a limited amount of flexibility in the definition of night.<sup>21</sup> In 1979, women holding administrative and technical posts of responsibility and women employed in health and welfare services who did not usually perform manual work were excepted from the ban. Apart from this, industries handling perishable goods could temporarily derogate,<sup>22</sup> the Labour inspector could authorise derogation in establishments carrying out work concerning national defence,<sup>23</sup> and in the case of *force majeure* short-term derogations could be made under the control of the Labour inspector.<sup>24</sup> Art.213-4 further provided that women must have a minimum period of rest of eleven hours during the night. The scope for employing women at night was clearly narrower than that laid out in the British provision.

### 2.1.2. Other types of female-specific employment regulation

In both countries this covered a rather motley range of provisions. These can be classified in two ways. Firstly by the area they regulate: chemical substances (reproductive hazards), lifting of weights, physical conditions, moving machinery, ablutions and sanitary conveniences, apparel, mines and quarries.<sup>25</sup> Secondly, they can be classified according to the type of regulation they embody.<sup>26</sup> Both the areas regulated and the regulatory methods differed in both jurisdictions.

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<sup>21</sup> Another period of seven consecutive hours between 10pm and 7am may be chosen as night. This is subject to the existence of an extended collective agreement plus a enterprise or establishment agreement. The authorisation of the Labour inspector (who must consult with union representatives and the enterprise committee or *délégués du personnel*) may be substituted for the lower level agreement. This possibility of collectively redefining night was introduced by Ordinance.no.82-41 of 16 January 1982; see Art.L.213-2 c.trav.

<sup>22</sup> Art.L.213-5 c.trav.

<sup>23</sup> Art.L.213-3 c.trav.

<sup>24</sup> Art.L.213-6 c.trav.

<sup>25</sup> Art.L.711-3 c.trav.; s.124(1) Mines and Quarries Act 1954.

<sup>26</sup> Ranging from complete prohibition, making authorization to carry out certain tasks or to be exposed to certain substances contingent on separate and different criteria for men and women, making provision for separate but equal facilities for both sexes, sex neutral parent provisions with sex differentiated secondary legislation in certain specific areas to the provision of certain items at work solely for women.

In both countries exposure to lead<sup>27</sup> and ionising radiation<sup>28</sup> was regulated differently for 'women of reproductive capacity'.<sup>29</sup> These areas were also subject to EC regulation and (where ratified by a particular state) ILO Conventions. France also forbade women (not just of reproductive capacity) to work with a range of substances only one of which - free silica<sup>30</sup> - was regulated separately for women in the UK. These included mercury, aromatic hydrocarbons, free silica, sand jets and compressed air.<sup>31</sup> In Britain a series of provisions prohibiting women working with certain types of moving machinery were still intact at the time of the passage of the sex discrimination legislation, while these had been revoked in France in 1975.<sup>32</sup> Both jurisdictions possessed female-specific provisions on the lifting of weights. In the UK, this was done by enacting a sex-neutral

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<sup>27</sup> For lead see for UK: ss.74,75,128,131 Factories Act 1961; Paints and Colours Manufacture Regulations 1907, Regulation 3; India Rubber Regulations 1922, Regulation 1; Lead Smelting and Manufacture Regulations 1911, Regulation 10; Electric Accumulators Regulations 1925, Regulation 1; Pottery (H&W) Special Regulations 1950, Regulations 6(1)(i)-(vii) (plus subsequently) Paragraph 118 of the Approved Code of Practice relating to the Control of Lead at Work Regulations. In EC see Council Directive 82/605/EEC of 28 July 1982 on the protection of workers from the risks related to exposure to metallic lead and its ionic compounds at work, OJ/L247/12 (23.8.1982) based on the Framework Directive 80/1107/EEC. The Directive does not specifically refer to women but Art.1(3) provides, 'This Directive shall not prejudice the right of Member States to apply or introduce laws, regulations or administrative provisions ensuring greater protection for workers or for a particular category of workers.' At international level see ILO Recommendation No.4 of 1919 on the protection of women and children from lead poisoning and Convention No.13 of 1921 on the use of white lead in paint (both referring specifically to women). France has ratified Convention No.13 (on 19.2.1926); the UK has not.

<sup>28</sup> For ionising radiation many changes took place following the passage of the equal treatment laws in both countries. However, the basic singling out of 'women of reproductive capacity' in the French and British legislation remained a constant feature. For the UK see The Ionising Radiations (Unsealed Radioactive Substances) Regulations 1968, Schedule and The Ionising Radiations (Sealed Sources) Regulations 1969, Schedule. See also the subsequent introduction of Parts IV and V of Schedule 1 to the Ionising Radiation Regulations 1985. For France see Decree No.66-450 of 20 June 1966 (general principles of protection) and Decree No.88-521 of 18 April 1988 9(7) and 10(3). At EC level, this area has been regulated since 1959, see for current regulations Directive 80/836/EURATOM of 15 July 1980 laying down the basic safety standards for the health protection of the general public and workers against the dangers of ionizing radiation, OJ/L246/1 (17.9.80) as amended Directive 84/467/EURATOM of 3 September 1984, OJ/L265/4 (5.10.94). Both countries have ratified ILO Convention No.115 concerning Protection of Workers against Ionising Radiations (France ratified 18.11.1971; UK ratified 9.3.1962).

<sup>29</sup> An interesting, critical analysis of this term is provided by Kenney, 'Reproductive Hazards in the Workplace: the Law and Sexual Difference', 16 *International Journal of the Sociology of Law* (1986) 393.

<sup>30</sup> SI 1950/65 Pottery (H&W) Special Regulations.

<sup>31</sup> Art.R.234-9 and Art.R.234-10 c.trav. The parent provision is Art.L.234-3 c.trav. which states 'Dans les établissements...qui sont insalubres ou dangereux et où l'ouvrier est exposé à des manipulations ou à des émanations préjudiciables à sa santé les jeunes travailleurs et les femmes ne peuvent être employés que dans les conditions spéciales déterminées, pour chacune de ces catégories de travailleurs, par des règlements d'administration publique.'

<sup>32</sup> See, for example, in the UK, Statutory Regulation and Order 1905/1103 Spinning by Self-Acting Mules Regulations 1905, Regulation 4 (no woman may work between the fixed and traversing parts of the machine while it is motion); in France female-specific moving machinery provisions were repealed in Decree no.75-753 of 5 August 1975.

parent provision<sup>33</sup> while three sets of Regulations made under this provision differentiated between men and women.<sup>34</sup> The French legislation laid down different maximum weight limits with or without various mechanical aids differentiated by both sex and age. However no upper limit for males over eighteen was laid down in this section.<sup>35</sup> Both countries had provisions requiring separate sanitary conveniences for men and women.<sup>36</sup> In the British pottery industry washing facilities for women had to be screened off.<sup>37</sup> UK law required overalls and headcoverings for women repairing sacks in the cement industry<sup>38</sup> and in the tin industry required that clothing accommodation be provided for women.<sup>39</sup> French law stated that women could not work outdoors in temperatures below freezing point where a doctor considered it necessary, required the provision of seats in shops for female staff and forbade the employment of female minors in drinking establishments.<sup>40</sup>

While this outline of female-specific provisions may seem rather arcane, it is important to know with some degree of precision the exact content of these measures. First of all, it is a useful corrective to the tendency to dump all of these measures either into an 'anti-equality' or a

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<sup>33</sup> S.72 Factories Act provided that 'a person shall not be employed to lift, carry or move any load so heavy as to be likely to cause injury'.

<sup>34</sup> These are the Woollen and Worsted Textiles (Lifting of Heavy Weights) Regulations 1926, Regulations 1 and 2, Jute (Safety, Health and Welfare) Regulations 1948, Regulation 4 and the Pottery (H&W) Special Regulations 1950, Regulations 6(6) and 6(7). See also s.93 of the Mines and Quarries Act 1954.

<sup>35</sup> Art.R.234-6 c.trav. For example, females over 18 cannot carry loads exceeding 25 kgs, males aged 16 and 17, 20 kgs; females of 16 and 17, 10 kgs. Additional limits are laid down for certain types of transport - trolleys, wheelbarrows, tricycles and push-carts. The two latter forms of transport may be banned to woman at the request of the occupational doctor. The parent provision is Art.L.234-2 c.trav. which states, 'Des règlements d'administration publique déterminent...les différents genres de travaux présentant des causes de danger ou excédant les forces ou dangereux pour la moralité, et qui sont interdits aux jeunes travailleurs de moins de 18 ans et aux femmes.'

<sup>36</sup> This is an example, not of treating men and women differently, but separately. In the UK this is governed by the Sanitary Accommodation Regulations 1938 (factories) and the Sanitary Conveniences Regulations 1964 (shops). In France this requirement was previously found in Art. R.232-23 and 33 and Art.232.38 c.trav. See now Art.R.232-2-1 c.trav.

<sup>37</sup> SI 1950/65 Pottery (H&W) Special Regulations.

<sup>38</sup> Statutory Regulation and Order 1930/94 Cement Works Welfare Order.

<sup>39</sup> Statutory Regulation and Order 1917/1035 Tin or Terne plates Manufacture Welfare Order.

<sup>40</sup> See Art.R.234-4 c.trav. (temperature regulation), Art.R.232-30 (seats in shops) and Art.L.211-5 (drinking establishments). All references here are to the Labour Code at the time of the introduction of equal treatment laws.

‘substantive’ equality basket on the grounds that they distinguish between men and women, encouraging us instead to examine more carefully the content, aim and practice of each type of female-specific employment regulation. Secondly, we can see clear differences between the regulatory frameworks dealing with the same issue in France and the UK. This is particularly striking in the case of UK night work regulation where it is clear that the effectiveness of the regulation of female night work was largely dependent on the criteria adopted by the HSE in granting exemptions. Therefore, while in France night work regulation effectively involved a ban, in the UK it more closely resembled a method of imposing a series of controls (the content and strength of which was largely dependent on the enforcement methods employed by the HSE) on a particular employment practice. Thirdly, using this list as our starting point, we can trace the differing fates of these pieces of legislation following the introduction of equal treatment norms.

While in both France and the UK, there was a wide spectrum of views on the relationship between the female night work ban and the introduction of equality laws, the balance of institutional dominance and control of the debate was markedly different in both countries. In France, change would have been very unlikely to occur either on the issue of collectively acquired rights or on the night work ban, had it not been for a series of litigation dynamics: one externally led by the Commission through its Article 169 action against France for the non-provision of adequate legal mechanisms for the amendment of female-specific rights in collective agreements,<sup>41</sup> and the other internally propelled by Article 177 references to the Court from the French courts which connected the French female-specific employment norms to the ECJ and its interpretation of EC equality obligations. In the UK, the dynamic which led to repeal was largely internally led, with Community pronouncements on the issue, in particular the Reasoned Opinion issued by the Commission at the end of 1986 and the Communication issued by the Commission in 1987<sup>42</sup> merely tying a ribbon around the second package of repeal measures proposed by the Government.

## 2.2 The UK in the first period: 1969-1979

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<sup>41</sup> Case 312/86, [1988] ECR 6315. See also Chapter 1 at n.30, Chapter 3 at n.192, Chapter 4 at Sections 5.1.3.2 and 5.1.3.3 and Chapter 5 at n.172 and Section 5.3.1.

<sup>42</sup> *Protective Legislation for Women in the Member States of the EC*, COM (87) 105 final.

The fact that the night work ban and other familiar landmarks of protective legislation, such as the ban on women in mines, passed away in the UK in the decade 1979-1989 without much of a send-off does not mean that this had not been a live and politically charged issue at an earlier period in time.

A 1969 Department of Employment and Productivity report<sup>43</sup> convinced the Conservative party that the time was ripe for the repeal of protective legislation and they unsuccessfully attempted to pull off a legislative coup to exchange protective legislation for the EqPA 1970. The report itself argued for a relaxation of certain pieces of female-specific regulation, but came down in favour of retention of the female night work ban.

In the Parliamentary debates on the Equal Pay Bill in 1970, three important points were made by Barbara Castle, leading the Bill through Parliament on behalf of the Labour government. The first is that the continuing need for protective legislation was explicitly questioned in the Parliamentary debates. The second is that a clear distinction was drawn between rights connected with childbirth and pregnancy on the one hand, and hours of work regulation on the other hand. While with regard to the former, she stated that 'we do not consider it preferential treatment for a woman to be given time off to have a baby, or to be paid while she is off', she regarded the hours of work question as 'more controversial'.<sup>44</sup> Thirdly, a clear connection was drawn between the projected disappearance of female-specific employment regulation and the introduction of equal pay.<sup>45</sup> Therefore, from the outset in Britain, a line was drawn between pregnancy and childbirth regulation, and other types of female-specific employment regulation, the latter being seen as much more suspect in the new equality context. However, the need for equality legislation to take root and for discussions with the two sides of industry on the issue of a female night work ban

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<sup>43</sup> Department of Employment and Productivity, *Hours of Employment of Women and Young Persons employed in Factories - A Report*, 1969.

<sup>44</sup> Barbara Castle, H.C. Debs. Vol.795, col. 921 (9 February 1970).

<sup>45</sup> 'However, I think it would be quite wrong to make the introduction of this legislation conditional on the blanket removal of the hours restrictions...it is also necessary to show that we are on the road to equal pay. I myself believe that the need for restrictions is disappearing fast, but the right way for me is to continue my discussions with both sides of industry', Barbara Castle, H.C. Debs. Vol.795, col. 921 (9 February 1970).

was underlined.

Between the passage of the EqPA and the Parliamentary debates culminating in the SDA, the Conservative Government recommended abolition in the context of sex discrimination legislation. The Select Committee on the Anti-Discrimination (No.2) Bill concluded, 'we, therefore, recommend that the aim of the Government's consultative process should be the elimination of all existing statutory restrictions on the employment of both men and women unless a satisfactory case is made out for their continuance.'<sup>46</sup> During the passage of the SDA 1975, the presence of strong trade unions and trade union opposition to the repeal of protective legislation (unless a number of conditions, such as the achievement of equal pay, were met) made the issue of whether protective legislation should be retained a divisive one in a Labour administration where many, particularly important female activists in the party, felt that anti-discrimination legislation and protective legislation simply did not mix.<sup>47</sup> The Conservative opposition successfully moved an amendment during the Standing Committee stage of the SDA to repeal Part VI of the Factories Act and related provisions in its entirety.<sup>48</sup> In order to satisfy trade union opposition to repeal, Conservative demands for repeal and prominent female activists within the Labour party opposing the government line, a compromise was reached whereby the issue was shunted temporarily sideways to the new EOC which was now required to review all the provisions concerned by the end of 1978.<sup>49</sup> Furthermore, certain female-specific provisions were modified in the SDA itself.<sup>50</sup>

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<sup>46</sup> Special Report from the Select Committee on the Anti-Discrimination (No.2) Bill 1972-3, H.C. Papers, No.333. It is also noteworthy that before the Select Committee, the TUC representatives seemed unable or willing to put forward convincing arguments as to why protective legislation should be retained beyond areas dealing with pregnancy and childbirth, Select Committee on the Anti-Discrimination (No.2) Bill, 22 May 1973, para.389.

<sup>47</sup> See further Lewis, Davies *supra* at n.4.

<sup>48</sup> H.C. Standing Committee, cols.436-48 (20 May 1975).

<sup>49</sup> The Government successfully moved to restore Part 6 but gave an undertaking that the Commission would be required to complete a first review of all sex-specific employment provisions concerned by the end of 1978, H.C. Debs. Vol.893, col.1580. What became s.55(1)(a) SDA already required the EOC to 'keep under review the relevant statutory provisions insofar as they require men and women to be treated differently'. The Government concession (to the Conservative (and internal) opposition) was to insert what became s55(1)(b) which granted an express power to the Secretary of State to 'require the EOC to report to him within a specified time on any matter specified by him which is connected with that duty and concerns the relevant statutory provisions'.

<sup>50</sup> S.15 Factories Act 1961 was modified thus permitting women to examine lubricate and adjust certain unfenced machinery. S.124 Mines and Quarries Act 1954 was modified by s.21 SDA so that instead of an absolute prohibition on women working underground in mines 'no female shall be employed in a job the duties of which ordinarily require the employee to spend a significant proportion of his time below ground at a mine which is being worked'.



The consequences of this sideways shunt were crucial. Up to 1975 the debate had at least remained lively, if not sophisticated.

### **2.3 France in the first period: the Roudy Law and female-specific employment regulation**

The contrast between the British and French debates on female-specific employment regulation in the context of the introduction of sex equality legislation is striking. In reconstructing the French debates on female-specific employment rights, three points should be borne in mind. The first is the existence in France not only of an edifice of limitations on female employment similar to those in the UK but also of a much wider and thicker mesh of female-specific employment rights, in particular dealing with childbirth and childcare issues.<sup>51</sup> The second is that, beyond the legislative level, in France, unlike in the UK, a thick web of collectively acquired female-specific rights has been spun.<sup>52</sup> Finally, the introduction of equality legislation in France, unlike in the UK, was specifically and explicitly based on the need for France to comply with its EC obligations to implement the equality directives.

While the issue of female-specific employment regulation was extensively discussed in the Parliamentary debates on the Roudy law, the possibility of re-examining the necessity of the female night work ban or other pieces of protective legislation was not even broached. Closer examination of the Parliamentary debates reveals that this was not because it was considered clear that ETD implementation did not require re-examination of the extensive body of female-specific employment regulation to see whether it needed modification. Rather, the debate reveals how impossible it was for the Socialist government, introducing the law, to challenge in any respect the continuing existence of protective legislation. This is despite the fact that the Socialists clearly and repeatedly expressed the opinion throughout the Parliamentary debates that female-specific protection of the type introduced during the first period of industrialisation was no longer necessary or desirable. Thus Mme Y. Roudy, the minister who steered the law through Parliament, stated,

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<sup>51</sup> See further Chapter 5 at n.146-148 and Section 5.3.2.

<sup>52</sup> See Chapter 5 at Section 3.5.3 and Section 4.

Arriver à leur assurer le maximum de protection fut dès lors le signe du progrès social. Mais les temps ont changé; les femmes aussi. Cette protection, indispensable lorsqu'il n'y avait aucune réglementation des conditions de travail et qu'aucun frein n'avait été posé au désir cupide du gain, à l'effort incontrôlé de profit économique, ne doit pas continuer d'engendrer une protection qui risque d'être dévalorisante, une marginalisation des femmes dans le monde du travail.<sup>53</sup>

A number of clear statements and amendments were made reflecting the Socialists' position that the ETD and the particular vision of equality pursued by this draft law required female-specific rights to be restricted to pregnancy and childbirth.<sup>54</sup> However, it was also made crystal clear in the debates, that while future employment rights would not be permitted to distinguish between men and women, rights which already existed would not be touched by the introduction of equal treatment legislation. A dual distinction was drawn. The first was of a temporal nature and clearly separated rights already acquired (which could distinguish on grounds of sex) and those introduced post-1983 (which would be permitted to distinguish only in the areas delimited by the 1983 law). A further distinction was drawn between pre-1983 female-specific rights, this time, a division based on sources. While those contained in legislation were considered *a priori* inviolable and untouchable - briefly and definitively placed outside the field of discussion, 'l'interdiction du travail de nuit, la limitation des poids à porter - l'on n'y revient pas',<sup>55</sup> collectively acquired female-specific rights were placed in a type of legislative limbo. Thus, while they were not eliminated by the law, the social partners were required - within an unspecified time limit - to bring female-specific collective rights into conformity with the principle of equal treatment.<sup>56</sup> The

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<sup>53</sup> JO, Senate, 12 May 1983, 791.

<sup>54</sup> See for example, Y. Roudy, JO, AN, 6 December 1982, 7981, 'tout droit nouveau sera désormais applicable aux travailleurs des deux sexes, exception faite, cela va de soi, des dispositions propres à la grossesse, au congé de maternité, à l'allaitement.'; M-F Lecur, JO, AN, 6 December 1982, 7996, 'ce projet de loi ne cherche pas à abolir les protections particulières aux femmes mais plutôt à éviter la prolifération de dispositions qui ne seraient pas liées uniquement à la grossesse et à la période d'allaitement'; Y. Roudy, JO, AN, 6 December 1982, 8006, 'Cet amendement va dans le sens de la commission qui souhaite voir disparaître des textes des dispositions instituant des avantages particuliers en faveur des seules femmes, sauf cas de grossesse ou d'allaitement.'; in the Senate, P. Louvol, JO, Senate, 11 May 1983, 802, 'Cependant, ce texte, pour être valide, doit reprendre les dispositions de la directive européenne de 1976, relative à l'égalité professionnelle, laquelle n'autorise les clauses dérogatoires prises en faveur des femmes qu'en ce qui concerne la grossesse et l'allaitement.'

<sup>55</sup> Y. Roudy, JO, AN, 6 December 1982, 7997.

<sup>56</sup> Art.19 of the 1983 law stated, 'Les dispositions des art. L.123-1 c et L.123-2 ne font pas obstacle à l'application des usages, des clauses des contrats de travail, des conventions collectives ou accords collectifs, en vigueur à la date de promulgation de la loi..du 13 juillet 1983, qui ouvrent les droits particuliers pour les femmes....Toutefois, les employeurs, les organisations d'employeurs et les organisations des salariés s'emploieront par la négociation collective, à mettre les dites clauses en conformité avec les dispositions des articles mentionnés.'

impossibility of introducing new female-specific rights outside the fields of pregnancy and childbirth, and the demands placed on the social partners by the law to examine currently existing female-specific collective rights were fiercely contested in a series of amendments from the Communist party.<sup>57</sup> The difficulties involved in attempting to accommodate this gritty resistance to even the gentlest foray on collectively acquired rights with the requirements of the ETD are perfectly encapsulated in the following statement by Mme Y. Roudy:

C'est ma conviction profonde et c'est pourquoi je la défends avec force - que ces dispositions de protection des femmes sont totalement contraire à l'objectif d'égalité professionnelle. Déjà, sur les avantages acquis, je me suis mis en infraction. Je n'en dis pas plus, mais j'aurais même pas du accepter le maintien des avantages acquis si j'avais respecté à la lettre la directive, et vous le savez très bien. Je l'ai fait parce qu'il existe une tradition profonde du syndicalisme et du mouvement ouvrier contre laquelle il ne faut pas aller. Donc, en ce qui concerne les avantages acquis, nous n'y touchons pas.<sup>58</sup>

Thus, the strength of resistance to the removal of female-specific legislative employment rights in the passage of the French equal treatment legislation is most clearly revealed in the absence of discussion of the possible need for modification of these rights throughout the Parliamentary debates, particularly when combined with the clear knowledge that failure to include this issue raised doubts as to the compatibility of national legislation with supranational equality requirements. The Government did not dare to go beyond the gentlest of attacks on female-specific collective rights.

In the UK, it was retention which sat uneasily with the vision of equality pursued. The outcome of the consideration of female-specific employment regulation in the context of the introduction of equal treatment legislation in the UK was that a clear consensus that female-specific employment rights were undesirable in a long-term perspective co-existed with uncertainty as to how or when the legislation might be repealed. The EOC was given the task of dispelling this

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<sup>57</sup> These proposed *inter alia* deleting the clause that future collective agreements could only differentiate on grounds of sex where pregnancy and childbirth were concerned, removing the requirement for the social partners to renegotiate currently existing female-specific rights and removing the requirement that positive action measures must be 'temporary'. This latter proposal would have allowed female-specific collective measures to be categorised as positive action measures.

<sup>58</sup> JO, Senate, 11 May 1983, 802.

uncertainty.<sup>59</sup>

### 3. Subsequent legislative developments: manipulating equality

#### 3.1 The UK in the second period: 1979-1989

##### 3.1.1 The EOC report in 1979<sup>60</sup>

The EOC report's fairly bald conclusion - that hours of work restrictions should be repealed with minimal safeguards of a largely transitional nature - was particularly important for two reasons. The first was the failure of the report to open up a more general debate on why such hours of work presented problems for women, including all the women who had never been covered by the female hours of work legislation. Thus, issues such as childcare regulation, transport for workers working shifts when public transport was irregular or unavailable and the broader issues of the gendering of hours of work and the shape hours of work regulation might take to provide effective regulation for all workers were not addressed in detail. No serious breach was made in the abolition/retention dialectic. The report considered that the arguments in favour of retention were few and therefore the weight of opinion must lie in favour of abolition. The continuation of some kind of protection was seriously considered only for workers currently covered by the legislation.

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<sup>59</sup> A number of legal mechanisms were inserted into the Roudy Law and the SDA to maintain female-specific employment regulation. See, in France, Art.123 c.trav. which commences by stating, 'Sous réserve des dispositions particulières du présent code et sauf si l'appartenance à l'un ou l'autre sexe est la condition déterminante de l'exercice d'un emploi ou d'une activité professionnelle, nul ne peut....' and Art.19 of the 1983 law *supra* at n.56. In the UK, see s.7(2)(f) SDA, nestled among the genuine occupational qualification (GOQ) provisions, which stated that it was a GOQ if, 'the job needs to be held by a man because of restrictions imposed by the laws regulating the employment of women'. See also s.51 SDA which provided an automatic defence to a sex discrimination claim for employers which could show that, 'it was necessary for him to do [the act] in order to comply with a requirement' of earlier legislation. This provision evidently included, but was not confined to, female-specific legislation. The most notorious illustration of this is in *Page v. Freight Hire (Tank Haulage) Ltd.* [1981] IRLR 13. In this case, the employer argued that he had removed Ms Page (a 23 year old divorced woman) from haulage involving the chemical dimethylformamide by virtue of his general duty under s.2 of the Health and Safety at Work Act 1974 to safeguard the health and safety of his employees. The EAT held that the employer had successfully established a s.51 SDA defence. It was not incumbent on the employer to show that the exclusion of the applicant was the only way in which the earlier statute could be complied with. Nor could Ms. Page's lack of desire or intention to become pregnant be conclusive where the risk is to the woman, of sterility, or to the foetus, whether actually in existence or likely to come into existence in the future.

<sup>60</sup> *Supra* at n.5.

The second was that while the report did make clear that the anti-equality nature of the legislation could be dealt with in two ways, either repeal or extension, these were presented, at best, in the report as equally valid options; normatively neutral ways of achieving the same goal. In stating that its overall recommendation was that the law should be repealed or, where health and safety demanded it, replaced so that it applied equally to men and women, it tilted the balance towards repeal as the dominant option. By failing to pinpoint or individuate in which particular areas health and safety or welfare made repeal an unacceptable option, it left a huge margin in which to argue that in any particular situation there were no particular health and safety requirements which needed to be dealt with through legislation.

The report provoked a flurry of opinions.<sup>61</sup> Not only did these responses often stay within the framework of abolition/retention but, more importantly, following these knee-jerk responses a deadly silence settled over the issue. Apparently the argument had been exhausted, with nothing of interest left to discuss. The legislation languished in this state of cast-aside forgottenness until its quiet repeal in 1986 and 1989.

Rather than providing an occasion for a reappraisal of what a better system of regulation of female working hours would be or for reconsidering the organisation of unsocial or variable hours of work, the laws were seen as anachronistic, ineffective and inequalitarian pieces of social legislation; to be remembered when it was time to clean up the statute-book but not so pressingly important as to require an urgent and concerted effort to get them off the statute book. During the years 1979-86, no serious attempts were made to revitalise the issues involved. Where protective legislation was given any space in the EOC Annual Reports of these years, it was generally as a

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<sup>61</sup> See, for example, CBI, *Memorandum of Views on EOC Report 'Health and Safety legislation: Should we Distinguish Between Men and Women?'* (11 February 1980) which states, 'The CBI regards the repeal of this legislation as being an essential step forward in the elimination of sex discrimination in the UK'; NUTGW (tailor and garment workers union), *For Better or Worse?* (1979) stressing the need to 'alert women factory workers to the nature of the superficial and dangerous "equality" the EOC is attempting to promote'. But see the TUC response (November 8 1979) which 'regrets that the EOC should have failed to give a more balanced consideration of the problems that undoubtedly exist in the current protective legislation' and the detailed critique of the EOC report by the Trade Union Research Unit, *The Control of Working Hours and Health and Safety Legislation: The Failings of the EOC and options facing the HSE*, Discussion Paper No.23 (Oxford, 1980). See also Coyle, 'The Protection Racket', 1 *Feminist Review* (1980) 1.

factor contributing to the maintenance of occupational segregation.<sup>62</sup>

The simple and antithetical relationship constructed between female-specific hours of work legislation and an equal treatment norm had several consequences. First, the failure between 1979-86 by the EOC to articulate this set of legislative norms with other emerging equality issues was largely echoed in doctrine. Even the old link between improvements in pay disparities and the possibility of re-examining the night work restrictions<sup>63</sup> was abandoned. While it is clear that this failure was certainly not confined to the EOC, given their important institutional role, the failure to define possible links may have played some role in leaving others oblivious to the possibility or utility of constructing such arguments.

Moreover, the EOC's construction of protective legislation as anti-equality made it difficult for others wishing to construct alternative models of the relationship between the equal treatment norm and protective legislation, and made it easy to wrongfoot their pleas as inegalitarian, out of touch or paternalistic.

Finally, this simple antithetical relationship facilitated those who wished to articulate a certain relationship between employment protection, equal treatment and employment opportunities. In this relationship, employment protection (in the shape of sex-specific protections) was antithetical to both equal treatment and employment opportunities. 'Employment opportunities', in this labour market discourse, required the removal of employment regulations which hindered job creation and the employer in trying to run its enterprise efficiently. The equal treatment argument in the context of female-specific employment protection was merely a interesting and contingently useful new ingredient in the labour market medicine regularly prescribed in the UK during the decade

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<sup>62</sup> See, for example, EOC *5th Annual Report* (1980) at 10, 'another recruitment difficulty which, generally speaking, confronts women and not men concerns night work...[b]y virtue of the Factories Act, women are debarred from certain kinds of night work and although employers may apply for an Exemption Order to overcome the problem, they are sometimes reluctant to do so, with the result that they can, and on occasions do, keep women out of certain sectors of their workforce'; EOC *9th Annual Report* (1984) at 11, 'legislation affecting employment, particularly legislation distinguishing between men and women, can be an important source of discrimination and cause of job segregation.'

<sup>63</sup> *Supra* at n.45.

1979-89. As we have seen in other chapters,<sup>64</sup> where equal treatment did not sit on the right side of this labour market equation, it received a rather cooler reception.

### 3.1.2 The process of abolition: the Sex Discrimination Act 1986 and the Employment Act 1989

While it would be tempting to quote at length from the Parliamentary debates and Standing Committees, the blinding simplicity of the approach adopted in each and every instance does not require nuanced explanation. In the 1986 and 1989 Acts the principal provisions of sex-specific industrial legislation in the UK were summarily abolished. They were not modified nor were they extended to men; they were simply removed.<sup>65</sup> Nor were any provisions introduced to facilitate the entry of women into these new areas (mines) or times (night) of work. The only survivors of this clean sweep were the provisions distinguishing between men and women in the field of reproductive hazards.<sup>66</sup> What is particularly important here is not the fact of eliminating legislation which distinguishes between men and women, but rather the manner of its going. In particular, I wish to investigate how equality, in almost all the areas examined, translated into unadulterated repeal of the regulatory system applying to women.<sup>67</sup>

#### 3.1.2.1 *Making equality = repeal*

The most important point to focus on here is not the suspect classification. It is a straightforward

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<sup>64</sup> See, in particular, Chapter 2 on the introduction of equal value legislation.

<sup>65</sup> The Sex Discrimination Act 1986 repealed female-specific hours of work provisions while the Employment Act 1989 repealed other female-specific provisions save those outlined in n.66. Thus referring back to Section 2.1 of this chapter the provisions in n.6-12, 25, 30, 32, 34, 38 and 39 have all been repealed or revoked. s.7(2)(f) (see *supra* at n.59) and s.21 SDA 1975 (see *supra* n.50) are also repealed. The repeal of s.124 (1) Mines and Quarries Act 1954 and s.21 SDA 1975 did not come into effect immediately after the Employment Act 1989 as the Government was bound by Article 8(4)(b) European Social Charter 1961, the denunciation of which could come into effect only as of February 1990. The government denounced the relevant ILO Convention No.45 of 1935 in 1988.

<sup>66</sup> The provisions detailed in n.27 and n.28 *supra* are specifically retained by the Employment Act 1989 s.4(1) and Schedule 1. This is not to suggest agreement with the current distinctions drawn between men and women in the field of reproductive hazards. S.51 SDA 1975 (see *supra* n.59) is altered but retained in the Employment Act 1989 s.3(3). The current statutory formula still retains the *Page* decision, discussed *supra* at n.59 as good law.

<sup>67</sup> Or in the case of the baking industry, for men and women regulated under two separate pieces of legislation.

application of an anti-discrimination rule to subject areas where a distinction is drawn between men and women to careful scrutiny. What is essential is to determine the outcome of this suspect classification investigation. How, in both the SDA 1986 and the Employment Act 1989<sup>68</sup> was the only possible outcome constructed as simple repeal? The ingredients of this repeal cocktail were as follows. First, the EOC report was employed by the government to argue that the only feasible, sensible option, flowing from the recommendations of the EOC report was straightforward repeal.<sup>69</sup> It was argued that,

It is difficult in this world to have things both ways. It is difficult to look ahead to the removal of all discrimination in the employment of women and at the same time argue against the removal of *restrictions* on the employment of women at night.<sup>70</sup>

The construction of restrictions was crucial in the shaping of the equality = repeal equation. It was important in making equality = repeal and not equality = extension to demolish the credibility of protective legislation. Thus, these 'restrictions' were 'impossible to defend.'<sup>71</sup> They were said to be discriminatory and to deprive women of valuable labour market opportunities. To deal with the argument that this body of legislation represented valuable health and safety protection, and a series of important procedural controls for various groups of workers, two chief sets of arguments were employed. First, the inconclusivity of the medical evidence on the health and safety effects of atypical hours of work patterns was underlined. In any case, it was argued, there was certainly no evidence that the health and safety effects of working shifts, antisocial or long hours were different for men or women workers. Second, the system of enforcement and exemptions in the hours of work regulations was portrayed as unnecessary, outdated, absurd,

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<sup>68</sup> The main focus here is on the SDA 1986 which repealed the female-specific hours of work regulations. For an excellent general discussion of the Employment Act 1989 see Deakin, 'Equality under a Market Order', 19 *ILJ* (1990) 1.

<sup>69</sup> See, for example, Lord Young (introducing the Sex Discrimination Bill in the HL), H.L. Debs. Vol.471, col.1179 (27 February 1986): 'The repeals will bring into line hours of work legislation as it affects men and women in keeping with recommendations made as long ago as 1979 by the EOC.' He goes on to selectively cite from the EOC report, see col.1180; see also Lord Trefgarne, col.558, 'the fact of the matter is that we have not plucked the provision out of the air, just like that. We are following the recommendations of the EOC in their 1979 report'. In the Commons, see Mr Clarke, H.C. Debs. Vol.98, col.572 (22 May 1986), 'Following a review of the legislation, the EOC issued in 1979 its report...As for hours of work legislation, its answer to the question that it had itself posed [should we distinguish between men and women] was a resounding no.'

<sup>70</sup> Lord Young, H.L.Debs. Vol.471, col.1211 (27 February 1986). Emphasis added.

<sup>71</sup> Mr. Clarke, H.C. Debs. Vol.98, col.573 (22 May 1986).



ineffective, awkward, curious nonsense, a near meaningless rigmarole of complex restrictions. Extending this string of maledictions to male working hours was evidently out of the question. Hence, the next step was to export the straightforward repeal argument to areas where the EOC had not recommended repeal.<sup>72</sup> Using the 'Hey presto!' formula derided by Lord Wedderburn during the Bill's passage through the Lords,<sup>73</sup> the restrictions on female hours of work were discredited. This magically transformed the maintenance of male-specific regulation in the baking industry into a major anomaly, thus necessitating its removal as well. The end result, of course, is that the controls on permanent night work in bakeries for both men and women were swept away in the SDA 1986.

Apart from the extension of the Bakery Act to female employees, the two other main amendments were to make dismissal of workers who did not wish to work hours they could not work under the existing legislation unfair and the introduction of a statutory duty requiring employers introducing substantial changes in hours of work to consider the health, safety and welfare of their employees and the domestic and family responsibilities of employees. Examining the arguments against these two amendments gives us an idea of the broader meaning of 'restrictions' being employed in the repeal process. First of all, the Government argued that there is a unity in the interests of men, women and British industry. Amendments such as these would, for the Government, 'undoubtedly be onerous for employers, *and thus damaging to the interests of employees*.'<sup>74</sup> Moreover, it argued that women and employers were perfectly capable of working out mutually satisfactory working time arrangements. Equal employment opportunities, in this labour market discourse, means the minimalisation of statutory 'restrictions' which hamper women entering the labour market and restrict their *individual* ability to organise working-time arrangements with employers. The other two arguments used to resist amendments were first, that the amendments were outside the scope of the Bill and secondly, that specific requirements, in mines or hours of work for example, would merely entail unnecessary duplication of existing

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<sup>72</sup> The EOC report recommended extension of the Baking Industry Act to women, made repeal of the restrictions on women working in mines conditional on improvements and changes being made in conditions underground in mines and recommended extension in other areas such as the cleaning of moving machinery.

<sup>73</sup> Lord Wedderburn, H.L. Debs. Vol.471, col.1183 (27 February 1986).

<sup>74</sup> Mr. Lang, Standing Committee A. H.C., col. 170 (24 June 1986).

general health and safety provisions in the Health and Safety at Work Act 1974. The former argument was particularly operative in the context of the statutory duty to consider domestic and family responsibilities when introducing substantial changes in existing hours of work.<sup>75</sup> The latter was used to combat arguments that mines were (due to the previous ban) unequipped with the basic necessities for women to work down them, that those using moving machinery should be trained and that specific weight limits should be sex-neutrally set.<sup>76</sup> Recourse was frequently made to the argument that general health and safety provisions eliminated the need for more specific health and safety provisions. Employing these arguments, which in different ways projected an image of the amendments introduced as unnecessary, irrelevant or positively irksome to both employee and employer, the argument that those presenting them are guilty of trying to subvert the path to equality was easily made:

It is not good enough to concede a principle [equality/anti-discrimination] on the one hand and then to think of every conceivable obstacle one can put in the way of its implementation.<sup>77</sup>

### *3.1.2.2 Making equality = almost repeal*

Of equal importance in the British debate on protective legislation is what those who were opposed to bare-faced repeal proposed as an alternative. What is particularly striking is that there was an implicit, almost total, consensus that current female-specific regulation had to go. Moreover, it was clear that the EOC position had remained static.<sup>78</sup> There were no new proposals and the amendments presented largely reflected the transitional safeguards envisaged for those

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<sup>75</sup> See, for example, the response to Ms Richardson, Standing Committee A, H.C., col.164-5 (24 June 1986), 'Will the Minister say whether those conditions include, for example, child care facilities' by Mr Lang, 'The honourable Lady seeks to draw me down avenues that would lead me outwith the confines of the Bill...[col.182] I do not believe that legislation has a place in the domestic and family responsibilities in this context.'

<sup>76</sup> For example Mr Nicholls, Employment Bill Standing Committee A, H.C., col.174 (9 February 1989), 's.2 of the Health and Safety Act...imposes a requirement to ensure, as far as is reasonably practicable, the health and safety of all employees. It is there deliberately as a catch-all provision to cover any situation that one might not be able to specify.'

<sup>77</sup> Mr Nicholls, Employment Bill Standing Committee A, H.C., col.187 (24 January 1989).

<sup>78</sup> The EOC Chair, Baroness Platt of Writtle, speaking in the H.L. Debs. Vol.471, col.1193 (27 February 1986) stated, 'certainly in 1979 the EOC stated its view that there is no longer justification for keeping laws on hours of work that treat men and women differently...in reiterating our 1979 position and so welcoming the Government's decision to repeal Part VI of the Factories Act 1961 and associated legislation...' (emphasis added).

currently covered by the legislation recommended in the 1979 report. EOC criticism of the governmental position clustered around the fact that it had selectively implemented its 1979 report.<sup>79</sup> Most of the serious opposition to the Bills focused on the baking industry in the 1986 debates and on the mining industry in the 1989 debates, both areas where the government explicitly went against the 1979 EOC recommendations. There were few signs of disagreement with the basic tenor of the EOC report, particularly as far as hours of work restrictions were concerned. There were no concrete suggestions for modifying the exemption procedure to extend it to men or to beefing up the resources of the HSE so that it could regulate night work and other working time patterns more effectively. There were no concrete proposals to extend a modified form of the legislation to all workers. Further suggestions as to why discussions in the UK took place along these lines are set out in Section 6 of this chapter.

### 3.2 France in the second period: post-1983

Whereas the first period discussed above<sup>80</sup> saw certain differences of approach and mobilisation around the issue of female-specific employment regulation, the second period reveals a yawning chasm between the conduct of the female night work debate in both countries.

The French night work debate post-1983 involves a much richer tapestry than the simple stitching up of female night work regulation and other female-specific regulation<sup>81</sup> that took place in the UK. It involved a multiplicity of actors (the French government, the legislature, unions, Labour inspectors, the Public Prosecutor, employers, female employees, the press, the criminal and civil

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<sup>79</sup> See Baroness Lockwood (former EOC Chair) at H.L. Debs. Vol.471, col.552 (11 March 1986), 'I think it a great pity that, having waited six years before having an amending Bill, the amending Bill should be selective in the recommendations it chose to implement from the commission. Nevertheless, I see the only way forward as the repeal of these particular measures.'

<sup>80</sup> *Supra* at Sections 2.2. and 2.3.

<sup>81</sup> Note that in France, apart from the changes to female night work discussed below and the changes to collectively acquired female-specific rights detailed in n.41, a number of other changes have taken place. The reference to women in Art.L.222-2 c.trav. (holidays) was repealed in Law No.87-423 of 19 June 1987. The compressed air prohibition in Art.R.234-9 was removed in Decree No.90-277 of 28 March 1990. The requirement to provide females seats in shops (Art.R.232-30) and the 10-hour maximum day for female workers (Art.L.212-9) are no longer found in the Labour Code. The exclusion of female minors from employment in drinking establishments (Art.L.211-5) has now been extended (Law No.92-675 of 17 July 1992) to all minors. All other provisions remain in force.

courts, the European Commission, the ECJ and the ILO) and of legal forms (collective agreements, derogation procedures, extension procedures, criminal proceedings, civil litigation, injunctions, Reasoned Opinions, infringement proceedings, preliminary references, ILO ratifications and denunciations, the setting aside of national law by judges). All of these developments were accompanied by the only significant focus by French doctrine on sex equality in employment. To facilitate comprehension of this debate, the milestones in its chronological passage will be outlined and similarities and differences with the UK debate signposted. In particular, I will begin to draw out in this section the argument that the regulatory framework adopted can alter the contextual formulation of formal and substantive equality. To back up this argument, the regulation of female night work in Italy, similar (though by no means identical) to that prevailing in France, and the discussion of the implications of the ECJ jurisprudence on female night work can be usefully contrasted with the UK debate.

### **3.2.1 The 1987 law**

In 1987, the French cohabitation government (RPR-UDF) introduced for the first time<sup>82</sup> a general mechanism for derogating from the female prohibition of night work principle. As in the UK, the need for legal change was accompanied by a trinity of justifications: the removal of discrimination, the right to a job and economic necessity (matched in the UK by removal of discrimination, employment opportunities, the removal of burdens on business). Here, however, the similarities end. The arguments against the proposed amendment and the shape of the final amendment differ markedly from those in the SDA 1986. Moreover, even the similarities with the UK rapidly reveal themselves to be more apparent than real when they are more closely examined.

Thus, while in the UK, the removal of discrimination was seen as a largely textual exercise, there being widespread agreement that the prohibition and exemption system had little impact on women actually working at night, in France the prohibition was seen as being directly responsible for the refusal to hire and the decision to fire female employees. Both those opposing and those supporting the amendment to the legal norm accepted that, at the time, Article 213-1 had real

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<sup>82</sup> Law No.87-423 of 19 June 1987. On the law see Pettiti, 'Le travail de nuit des femmes: Aspects nationaux et internationaux', *Droit Social* (1988) 302; see also Ray, 'Les accords sur le temps de travail', *Droit Social* (1988) 99.

effects on female night work employment in the sectors covered by the prohibition.<sup>83</sup> Hence, the deprivation of employment opportunities for women and the link with equality was seen as a very real and immediate one. Finally, economic necessity was not seen as equating with removing burdens on business, as in the UK. Rather, it was presented as vital to keep France in the race with its international competitors.<sup>84</sup> Thus, numerous references were made to foreign competition and specifically to the fact that France's chief competitors (including the UK) had substantially modified the regulation of female night work.

There are at least three possible reasons for the French debate being structured in this manner. First, the legal prohibition was much stricter than that prevailing, for example, in the UK pre-1986. Up to 1979, the coverage of the French prohibition was wider than the provisions of ILO Convention No.89. Secondly, the existence of collective agreements providing for female night work, which were in limbo at the time of the 1987 debates,<sup>85</sup> anticipating that a change would soon come about in the law, indicated a willingness in at least some sectors for employers and unions to recognise the need to introduce female night work. Thirdly, structuring the debate in terms of economic necessity was essential to sustain the Government's claim that they were acting within the terms of ILO Convention No.89, adopted in 1948, with which France was bound to comply.<sup>86</sup> The Convention, ratified at some point by all Member States<sup>87</sup> except the UK, Germany (which did specifically regulate female night work) and Denmark (which did not) prohibits female night work in industry. Article 5 of the Convention, however, states that the prohibition may be departed from only where particularly serious national circumstances exist and following

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<sup>83</sup> The connection between the concrete loss of employment due to Art.213-1 is repeatedly emphasised throughout the Parliamentary debates by the Minister for Employment, P. Séguin, 'l'interdiction du travail de nuit des femmes se traduit déjà par le licenciement ou une menace de licenciement pour les centaines des femmes ainsi que par une discrimination à l'embauche', JO, AN, 3rd Session of 19 December 1986, 7009; 'compte tenu notamment des menaces de discrimination à l'embauche ou des menaces de licenciement pesant sur les femmes', JO, AN, 12 May 1987, 1021; 'les centaines de femmes qui ont été licenciées parce qu'elles ne pouvaient pas travailler la nuit ou auxquelles on a opposé des refus d'embauche pour cette même raison', JO, AN, 12 May 1987, 1081.

<sup>84</sup> Pettiti notes that the economic objectives were always more important in the Government's arguments than the social objectives, *supra* at n.82 at 305.

<sup>85</sup> See *infra* Section 4.1.

<sup>86</sup> Convention No.89 was ratified by France on 7 July 1953.

<sup>87</sup> In the Community of twelve, not the Union of fifteen.

consultation with the social partners. The Government, in fact, reworded their original amendment to bring it closer to the wording of Article 5 following strong and sustained critique by the Socialist opposition that the initial legal amendment breached France's international law obligations.<sup>88</sup> Notwithstanding that, even reworded, it was still unlikely that the 1987 law conformed with Article 5,<sup>89</sup> there is no doubt that the existence of the ratified ILO Convention in France significantly influenced the shape of both government and opposition discourse and played a pivotal role in shaping the range of modification options and the final shape of the amendment.

The other arguments employed to argue against amendment can be fruitfully contrasted with both the UK SDA debates and the French 1983 debates. It will be recalled that in the 1983 French debates, while the Socialists' arguments sought to limit different treatment for men and women to pregnancy and childbirth, female-specific legislative measures were seen as too sensitive an area to interfere with.<sup>90</sup> In the British debates, we witnessed a general consensus that female-specific night work regulation had to go, with opposition arguments being couched in terms of transitional safeguards for those currently covered by the legislation.<sup>91</sup> Neither of these trends is observable in the opposition arguments concerning female night work in the 1987 debates in France.

Unlike both sets of Parliamentary debates referred to above, all those opposed to the 1987 amendment argued that there were plenty of good reasons for retaining the law in its current form, and that there was a clear distinction between 'real' equality measures and attempts to dilute

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<sup>88</sup> See for example, JO, AN, 12 May 1987: G. Collomb at 1018, 'en contradiction de manière flagrante avec notre Constitution'; J. Hofmann at 1022, 'ce projet de loi est illégal au regard de la Convention No.89 de l'OIT ratifiée par la France'. The government response is that Article 5 ILO Convention 89 makes the amendment lawful; P. Séguin, JO, AN, 19 December 1986, 7009, 'et qu'on ne vienne pas m'opposer la Convention No.89 de l'OIT, convention que nos principaux concurrents industriels soit n'ont pas ratifiée soit ont dénoncée, et donc l'application peut être suspendue lorsque des circonstances particulièrement graves - et la menace de centaines de licenciement pesant sur centaines femmes en est une - l'exigent.'

<sup>89</sup> See further Pettit, *supra* at n.82, especially at 308-309 who doubts whether the new legal provision conforms with the Convention. See however, the ILO Committee of Experts comments on the 1987 law in their 1988 Report where they note the reproduction of the terms of Art.5 ILO Convention No.89 in the French law and underline their expectations that suspensions would only be authorised under the conditions, and within the limits laid down in the Convention; information taken from 'Night Work for Women', 8 *IJCLL & Ind. Rel.* (1992) 180 at 182-3.

<sup>90</sup> *Supra* at Section 2.3.

<sup>91</sup> *Supra* at Sections 3.1.2.1. and 3.1.2.2.

female night work regulation. There is little sense of the opposition being put on the defensive by the equality argument, as happened in the UK. It was argued that the current law was not rigid and already provided sufficient opportunities for female night work where this was necessary. Thus, no further changes to the law were considered necessary or desirable.<sup>92</sup> The arguments on equality and discrimination clearly distinguished modification of the night work ban in two ways. Firstly, it was consistently argued that, in the development of a general policy to remove sex discrimination in employment, the modification of the night work ban was far down the list of priorities. In addition, it was only to be considered when empirical evidence existed of an overall improvement in women's employment position and in their possibilities to organise work, family and personal time more satisfactorily.<sup>93</sup> Secondly, modification of the night work ban was firmly set outside the list of equality measures envisaged by - or within the spirit of - the 1983 equality law. Equality measures included equal pay, women-only training, more qualifications and promotion opportunities, positive action plans, better maternity protection, more crèche facilities. To include the modification (or removal) of the female night work ban in this list was seen as a cynical distortion of the meaning of equality:

J'ai alors compris que nous n'avions pas du tout la même conception de l'égalité entre les hommes et les femmes. (...) Permettre le travail de nuit des femmes au nom de l'article L. 123-3 de la loi du 13 juillet, c'est une interprétation tout à fait perverse de son esprit. C'est si vrai que j'avais à l'époque refusé d'introduire cette mesure dans la loi sur l'égalité professionnelle.<sup>94</sup>

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<sup>92</sup> See G. Collomb, JO, AN, 12 May 1987, 1018, 'la loi actuelle ne présente pas les rigidités qu'on veut bien lui prêter'; J. Hofmann, JO, AN, 12 May 1987, 1022, 'des dérogations à l'interdiction du travail de nuit existent déjà pour des raisons techniques liées à certains secteurs et à certains postes de responsabilité. Nous pensons que cela suffit. Considéré comme exceptionnel, il permet des compensations, assure des droits et des acquis obtenus par la lutte et garanties par les statuts et conventions collectives'; G. Collomb, JO, AN, 9 June 1987, 2127, 'Vous nous dites qu'il faut introduire des souplesses. Ces souplesses, on vous l'a montré, elles existent déjà partout où c'est nécessaire.'

<sup>93</sup> See for example Y. Roudy, JO, AN, 12 May 1987, 1046, 'tant que les femmes continueront à constituer un marché du travail au rabais, particulièrement celles qui sont visés par cette mesure, les plus exposées, les plus fragiles et les plus exploitées, la priorité ne sera pas l'autorisation de travailler la nuit. (...) Peut-être pourrions-nous un jour abroger cette interdiction, mais ce sera seulement lorsque les choses sont plus égales par ailleurs, lorsque seront réduites les inégalités entre les salaires et les inégalités de promotion'; V. Neiertz, JO, AN, 4th Session of 19 December 1986, 7945, 'Rétablir le travail de nuit des femmes, est-ce une mesure urgente à prendre? Est-ce une mesure d'ordre social? Ce n'est pas en tout cas une mesure que les femmes réclament...'

<sup>94</sup> Y. Roudy, JO, AN, 12 May 1987, 1046. Note that this constitutes a significant shift from the general thrust of her, and the Socialists', arguments in the 1983 debates. See *supra* at Section 2.3.

Elles occupent les emplois les moins qualifiés, sans perspective de formation, de promotion, et vous prétendez que le travail de nuit va leur apporter l'égalité. Quel cynisme, car vous savez fort bien que c'est le contraire qui se produira! Le travail de nuit n'est pas en elle-même porteur de qualification, de promotion professionnelle, tout au contraire.<sup>95</sup>

The final argument brought against the amendment concerned the dangers of night work in general. Given these harmful effects, it was argued that any extension of night work constituted social regression.

The legal provision (Article 14 of the law) which emerged from the 1987 debates modified the female night work ban as follows. As stated above, it introduced a general derogatory mechanism from the prohibition of night work principle. To set into motion the derogation a number of conditions had to be fulfilled. First it applied only where 'due to particularly serious circumstances it is required by the national interest'. The law subjected derogation to two further conditions which involve overlapping and dependent collective agreements. An agreement at branch level which has been subject to the extension procedure is required. The circular accompanying the law states that the administration (in this case the National Commission on Collective Bargaining, hereafter NCCB) should not extend an agreement unless it is justified by the prevailing social and economic conditions. Secondly when (and only when) such an extended agreement exists, a further agreement at enterprise or establishment level may permit a derogation from the prohibition principle and women may work at night in the enterprise or establishment concerned.

### **3.3 Comparing models of regulation: UK, France and Italy**

Thus a year after the complete abolition of female night work regulation in the UK, France introduced a substantial modification in its female night work provisions. Two further points should be made with regard to the 1987 law. First, even with this modification, the possibilities for women to work at night were much more comprehensively regulated than they were in the UK prior to the SDA 1986. Second, two very different modes of regulation are at work in the old UK night work model and the new French model; the former being based on administrative regulation of the employer, the latter based primarily on regulation through a legislatively defined collective

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<sup>95</sup> J. Hofmann, JO, AN, 12 May 1987, 1022.



bargaining model with the administration playing a residual role in checking compliance with the legislative framework. This model bears important similarities to that introduced in Italy. Italian regulation of female night work provides a useful and interesting comparison for a number of reasons. Unlike France and the UK, the regulation of female night work was not only modified in parallel to the introduction of equal treatment laws, the new night work model is contained within the equal treatment law itself. Secondly, extensive use in the Italian equal treatment law is made of the technique of using collective derogations in order to regulate equality/protection conflicts.<sup>96</sup> So far as night work is concerned, the old prohibition contained in the 1934 law is maintained (in a modified form) in Art.5(I) of the 1977 law.<sup>97</sup> However, Art.5(II) permits this prohibition to be collectively lifted 'in the context of particular production requirements and taking into account the environmental conditions of work and the organisation of services'. Thus, the French and Italian models are similar in setting out first, the prohibition and secondly, the possibility for collective agreements to set aside this prohibition. They differ, however, in the conditions which need to exist for the collective de-prohibition to be set into motion: particularly serious circumstances and national interest in France; production requirements in Italy. They also differ in the delineation of the bargaining procedure through which this de-prohibition can take place: in France a clearly set out series of levels of agreement; in Italy a total absence of definition apart from an indication that enterprise level bargaining will *also* suffice. Moreover, it is clear that the 1977 Italian model breached ILO Convention No.89 despite the fact that Italy remained bound by this Convention.<sup>98</sup>

Bringing Italy into the picture is important for a further set of reasons. We have seen in other

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<sup>96</sup> For example Art.1(V) of Law no.903 of 1977 (the Italian equal treatment law) states that above and beyond the list set out in the law where sex is a genuine occupational qualification (GOQ), collective bargaining may agree on further situations where sex is a GOQ. The law furthermore tacitly repeals Art.10 of Law No.653 of 1934 which prohibits women from performing particularly heavy tasks, by stating that women cannot be refused a job on the grounds that it is too burdensome. However, Art.1(IV) 1977 law allows collectively agreements to derogate from this norm for 'particularly heavy tasks'; see further M.V. Ballestrero, *Dalla tutela alla parità* (Il Mulino: Bologna, 1979) at 253ff.

<sup>97</sup> For example, the night becomes an hour shorter (midnight to 6am); the ban applies to manufacturing establishments (narrower than industrial establishments); women in positions of responsibility or engaged in sanitary jobs are excluded. The pre-1977 norm is contained in Arts.12,13,14 Law No.653 of 1934; Law No.1352 of 1952 (ratifying ILO Convention No. 89) and Decree of 5 July 1973.

<sup>98</sup> In fact Italy was subject to continual criticism for this provision from the ILO Committee of Experts; see 'Night work for Women', 8 *IJCLL & Ind. Rel.* (1992) 180 at 182.

areas that the circulation of equality concepts, definitions and practice, defined or re-defined at EC level, is extremely limited in a Franco-British comparison. Comparing France, the UK and Italy in the framework of the equality/female night work ban dialectic shows once again a very limited transfer and circulation of common equality currency between France and the UK.<sup>99</sup> Despite a high degree of awareness of supranational equality developments in the UK, the three ECJ judgments on equal treatment and night work received very little attention. In sharp contrast, the reception of the *Stoeckel* decision in Italy and the problems raised in France and Italy respectively pre- and post- ECJ intervention in the context of female night work evidence clear signs of equality engagement in this area.

From this observation, two tentative hypotheses can be formulated. The first is that the implementation of the equality directives and their subsequent interpretation by the ECJ does not by any means lead to the straightforward and uniform absorption of EC formulated equality law. A picture of the Member States as sponges being equally sprinkled by the pronouncements of the ECJ grossly distorts reality. So too does a picture of Member States as impermeable shells opening their EC equality law hatch as and when it suits them. Rather, the picture emerging is of a contingent, fragmented EC/Member State equality dialectic. The second hypothesis we can make is that the regulation of, and mobilisation around, a particular part of equality/employment law at national level may be a useful indicator in pointing out when these contingent engagements may take place and how the Court's intervention will be evaluated in terms of formal and substantive equality. That this may be a better indicator than whether a preliminary reference took place is amply illustrated by the case of Italy whose courts have never referred the issue of female night work to the ECJ, yet where there has been a high level of engagement with the ETD and the Court's jurisprudence in this sphere. Furthermore, the night work example makes it clear that a measuring up of Member State legislation against a clarification of Community equality law (here, that a female night work ban contravenes the equal treatment directive) to determine whether it breaches (France, Italy, Belgium, Germany) or conforms (the UK) provides only one evaluation criterion. It is important not to fall into the trap of using this as the only criterion by which to judge the 'success' or 'failure' of national laws. There may evidently be more than one way of conforming with an ECJ judgment.

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<sup>99</sup> See, in particular, Chapter 3 at Section 5.

Examining the French courts' entanglements with national, supranational and international norms and combining this with a parallel examination of the circulation of the ECJ night work jurisprudence (originating in references from France and Belgium) in France and other countries can provide us with material to examine the night work issue from different angles and to critically evaluate the ECJ's contribution to this debate.

#### **4. Night work in the Courts: national, supranational and international norms**

##### **4.1 Putting the collective derogation system into practice: France and Italy**

Prior to the passage of the 1987 law, the French metallurgy industry signed an agreement on 17 July 1986 which stated that a 'collective agreement at enterprise or establishment level could lay down derogations from the regulation of the night work of women where this was necessary because of continuous working or successive shift working.' Article 4 of this agreement<sup>100</sup> provided that this provision would only come into force when the appropriate legal amendments had been made. This agreement ultimately turned out to be the only branch agreement on female night work which passed muster with the NCCB and was thus made subject to the extension procedure on 1 October 1987.<sup>101</sup> By 1991, approximately eighty enterprise level agreements on female night work had been concluded in this industry.

This obviously meant that outside the metallurgy industry, enterprise level agreements on female night work were illegal. Inside the metallurgy industry, the questions of who could legitimately conclude and who could legitimately contest an enterprise level agreement authorising female night work brought the unions to the courts immediately after the passage of the 1987 Act. In November 1987 a company in the metallurgy industry, SA Timken-France, concluded an

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<sup>100</sup> Signed by UIMM (Union des industries minières et métallurgiques) on the employers' side and by CGC, CGT-FO and the CFTC on the union side.

<sup>101</sup> For an example of a female night work clause which the NCCB refused to extend see the *avenant* (additional clause) of 14 December 1987 to the 1982 agreement in the *Salaison charcuterie en gros* industry; the NCCB extended the whole *avenant* except Art.3(2) dealing with female night work. See also the milk industry agreement (refusal to extend clause on female night work). Information from Savatier, 'Travail de nuit et droit communautaire', *Droit Social* (1990) 466 and Bué and Roux-Rossi, 'Le travail de nuit des femmes dans l'industrie: Les renseignements d'une étude monographique', 56 *Travail et Emploi* (1993) 19 at 21.

agreement on female night work with the CGC. The other unions in the enterprise immediately sought a ruling in chambers<sup>102</sup> that the agreement was invalid (*non-écrit*) on two grounds. First, the CGC did not represent the workers affected by the agreement who were manual workers<sup>103</sup> and secondly, the unions had validly employed their legal right of objection to the agreement.<sup>104</sup> The judge stated that he could not make a decision on either the validity of the agreement or the capacity of CGC to conclude an agreement chiefly affecting manual workers (*accord catégoriel*). However, using the emergency powers possessed by the *juge des référés*, he ruled that SA Timken-France could not employ women at night until the validity of the agreement had been determined as the situation involved imminent harm for the female employees covered by the disputed agreement.<sup>105</sup>

SA Timken-France challenged this decision before the Colmar Appeal Court<sup>106</sup> on the grounds that the right of objection did not apply, that the *juge des référés* had no competence, given that this was a serious dispute, and that there was no imminent harm for the women involved, given that their participation in night work was voluntary. This time the Court did not see the issue of

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<sup>102</sup> A ruling in chambers (*procédure des référés*) is an accelerated procedure whereby a judge may, where there is a serious (legal or factual) dispute, order temporary measures to prevent imminent loss or harm until a decision on the substance has been taken. Where no serious dispute arises as to the existence of an obligation, the judge may order the obligation to be met by the party breaching that obligation.

<sup>103</sup> As the 1979 law had excluded managerial and professional employees from the scope of the night work prohibition.

<sup>104</sup> The right of objection (Art.L.132-6 c.trav.) was introduced in 1982 and gives majority unions (defined as those who have obtained more than half the votes in the most recent elections to the enterprise committee ) in an enterprise the right to veto derogation agreements (where the legislative provision permits derogation) which they have not signed. Legitimate exercise of this right deprives the agreement of all legal force.

<sup>105</sup> *Union des syndicats des travailleurs de la métallurgie CGT du Haut-Rhin, syndicat départemental de la métallurgie CFDT du Haut-Rhin, syndicat départemental de la métallurgie CFTC du Haut-Rhin v. SA Timken France*, Tribunal de Grande Instance (TGI) of Colmar, 21 November 1987. For details of this decision see Favennec-Héry, 'L'opposition à un accord dérogatoire à l'interdiction du travail de nuit des femmes', *Droit Social* (1989) 315. See also the use of the right of objection by CGT and FO to challenge the signing of a female night work agreement between SA Valinox and the CFDT. Here the *juge des référés* ruled that while he was not competent to decide if the right of objection could be employed, as the prohibition of female night work is the principle, exceptions to this principle must therefore be restrictively interpreted and accordingly the agreement of 20 June 1989 could not be implemented until a decision was taken on the validity of the agreement, TGI of Dijon, 13 July 1989, reported in *Droit Ouvrier* (1990) 266.

<sup>106</sup> *SA Timken France v. syndicats des travailleurs de la métallurgie CGT du Haut-Rhin, syndicat départemental de la métallurgie CFDT du Haut-Rhin, syndicat départemental de la métallurgie CFTC du Haut-Rhin*, CA Colmar, 10 February 1988. The case is reproduced in *Droit social* (1989) 323-325.

whether the right of objection applies as raising a serious dispute. It ruled that the right of objection applied to agreements under Art.213-1 and that the unions had fulfilled the necessary conditions to validly object to the agreement. This means that the Court saw the night work agreement as being deprived of all legal force. Favennec-Héry, while disagreeing with the Court in its decision that the issue of the right of objection did not constitute a serious dispute, comments favourably on the Court's control of the derogation procedure in the context of female night work:

L'art. 213.1 al.3, qu'il ait une fonction économique ou qu'il vise à supprimer les discriminations entre hommes et femmes, répond à une nécessité. Mais la procédure instituée représente le dernier garde-fou au risque d'une utilisation massive du travail de nuit. L'exigence d'un accord de branche étendu permet en principe, de vérifier que la dérogation est justifiée par un intérêt général. L'accord d'entreprise est de nature, aux yeux de rapporteur du projet de loi, à faire respecter le principe du volontariat dans l'entreprise. L'exigence d'un double niveau de négociation est une garantie nécessaire. L'arrêt de la cour d'appel de Colmar a eu le mérite de le rappeler.<sup>107</sup>

Timken-France challenged the Appeal Court's decision before the *Cour de Cassation*.<sup>108</sup> The Court baldly stated that the right of objection was not applicable to an enterprise agreement permitting female night work under the terms laid down in Art.213. This decision has been heavily criticised on the grounds *inter alia* that statements by the minister who introduced the law stated explicitly that the right of union opposition would apply to female night work enterprise agreements in order to ensure the willingness of the women affected to work at night.<sup>109</sup>

What is the rationale of the collective derogation procedure? Through these decisions we can see a number of possibilities emerging. First, as night work is *a priori* undesirable, the existence of a number of regulatory hurdles before it is introduced helps to prevent mass recourse to night work, ensuring that it is only utilised where it is really necessary. Second, the need to reach agreement gives the unions a bargaining lever to obtain guarantees and compensation for night

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<sup>107</sup> Favennec-Héry, *supra* at n.105 at 322.

<sup>108</sup> *Société Timken-France v. unions des syndicats des travailleurs de la métallurgie CGT du Haut-Rhin et autres*, Cass. Soc. 12 December 1990, Bull.no. 659; also reproduced with note by R. Pascré in *Droit Ouvrier* (1991) 424-426.

<sup>109</sup> See Pascré *ibid*.

time workers. Thirdly, by focussing very specifically on the most local level, the enterprise agreement will ensure that the women affected will have a genuine choice as to whether or not to work at night and to ensure that the conditions in which night work is carried out take into account particular constraints or difficulties faced by female night workers. This implies that the social partners, and in particular the unions, are selected as the institutional grouping best placed to represent the interests of female workers in the enterprise and to decide whether they can work at night and under what conditions.

Challenges to the exclusivity of this institutional privilege in the Italian courts by female workers have produced some interesting reflections on the rationale of the collective derogation mechanism in the context of female night work and its relationship with an equal treatment norm. It will be recalled that the 1977 Italian equal treatment law replaced the 1934 prohibition with a model laying down the prohibition (Art.5(I)) and allowing for collective derogation from this principle (Art.5(II)).<sup>110</sup> In a challenge to the 1934 female night work provisions which commenced before the 1977 law came into force, the Italian Constitutional Court held that the 1934 female night work prohibition was unconstitutional with regard to Art.37 of the Constitution (the first paragraph of which guarantees the same rights to men and women).<sup>111</sup> It was widely anticipated that the Court would come to the same conclusion when it had to consider the constitutionality of the 1977 night work provisions. However, in a series of decisions it upheld the constitutionality of the 1977 night work model.<sup>112</sup>

While the Constitutional Court did not provide extensive reasons for its decision to distinguish between the equality conformity of the 1934 and the 1977 night work models, the Court of Cassation in a subsequent female night work dispute developed a rich set of arguments on the place of the collective derogation night work model in equality and employment regulation.<sup>113</sup> In

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<sup>110</sup> *Supra* at n.97 and accompanying text.

<sup>111</sup> Judgment No.210 of 24 July 1986, reproduced in *Parte II Diritto del Lavoro* (1987) 386.

<sup>112</sup> Judgment No.246 of 6 July 1987 confirmed by Ordinance No.378 of 6 July 1989 and Ordinance No.57 of 6 February 1990.

<sup>113</sup> *Spa Fratelli Quinto e Manfredi v. D'Alessandro, Lopez, Berardi e Lo Franco*, Cass, 24 April 1993, No.4802 in *Massimario di Giurisprudenza del Lavoro* (1993) 353.

this case, the representative unions in the enterprise concluded an agreement with the employer on female night work. A number of women (who were members of the unions involved) did not want to work at night and challenged the validity of the agreement in legal proceedings. The *Tribunale di Matera* held that the unions could not, over and above the willingness of the individual female workers, negotiate away their individual right not to work at night, this right deriving not from the collective agreement but from the law itself. On appeal, the Court of Cassation developed a nuanced account of the place of the 1977 night work model in the sphere of female employment regulation. It stated that the 1977 law was born of the realisation that a female employment regulation model, developed around the need to protect the maternal function and the psycho-physical weakness of women, resulted in restricting the hiring and progression of women in employment. In implementing the ETD in the 1977 law, the legislator chose to retain some of these protective measures, but refocussed them in a manner completely different from the traditional protection model. According to the *Corte di Cassazione*, the entrusting to collective bargaining of concrete areas of protection signified the rejection of the protection of women as a culturally defined category, opting instead for a regulatory model attuned to the diversities of working life. The Court of Cassation's comments on the impugned collective agreement are worth reproducing in full:

It is in fact the collective agreement - which the ETD also refers to as a flexible and effective regulatory instrument - which can best, particularly at enterprise level, take into account existing working conditions and manage the conflict between 'equality and protection'....[It can] remove the obstacles to female work with the introduction of measures of prevention and control capable of providing effective protection of the health of all workers (men and women) and can make the necessary choices between the possible, even contradictory, interests of female employees in relation to the full realisation of the principle of equality (thus the derogations allowed through collective bargaining reveal negotiated equilibria), which alone are, according to the legislator, the actualisation of equality-as-principle into equality-as-effectiveness.

For the *Corte di Cassazione*, Italian regulation of female night work *cannot* breach the constitutional guarantee of equality as the norm containing the prohibition grants the power to destroy itself to the social partners. This simultaneously removes the right of women not to work at night (this being part of the traditional system of protection) but grants the power of removal exclusively to the social partners (thus ensuring removal will only take place when the unions consider it to be appropriate). Therefore, the Court concluded that the agreement was valid and

the dissent of some female employees *de jure* irrelevant.

#### 4.2 Female night work models and equality formulations

This analysis of what collective derogation can mean should not be taken to imply that the rationales for collective derogation are identical in France and Italy or that collective derogation in practice operates in the same way in both jurisdictions. In France, the emphasis remains firmly on the female-specific nature of the prohibition with arguments, on the one hand, that female-specific protection should be retained as far as possible (hence, viewing it as important to tightly limit collective derogation)<sup>114</sup> and, on the other, that this female-specific protection is no longer justified (but that a system of collective regulation within a legislative framework is a possible model for controlling night work for both sexes).<sup>115</sup> *In neither case is equal treatment seen as being achieved* through the ban or the collective derogation model. Hence, equal treatment is not seen as being appropriate in this area, given the particular constraints faced by women (thus justifying the maintenance of as strictly controlled a system of female night work regulation as possible). Alternatively, the current system, even when combined with the possibility of collective derogation, is seen as infringing the equal treatment principle. This may be connected to the fact that the system of derogations in France is strictly defined in order to conform as closely as possible with the ILO Convention, which sees the prohibition as the rule and derogations as strictly defined exceptions.

In Italy, as we saw above,<sup>116</sup> the whole rationale of the female night work regulation system in the 1977 equal treatment law was *the achievement of equality*. Here, the argument starts not from the equal treatment rule but from the area to be regulated. For example, the 1977 law removed the prohibition on women carrying heavy weights but allowed the social partners to introduce, when they felt it necessary, sex-differentiated weight limits. As regards night work, the social

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<sup>114</sup> See, for example, Bonnechère, 'Égalité de traitement en droit communautaire et travail de nuit des femmes', *Droit Ouvrier* (1991) 351 at 355.

<sup>115</sup> See Moreau, 'Travail de nuit des femmes, observations sur l'arrêt de la CJCE du 25 juillet 1991', *Droit Social* (1992) 174 and Junter-Loiseau, 'Le travail de nuit des femmes', 65 *Liaisons Sociales Mensuel* (1992).

<sup>116</sup> *Supra* at text accompanying n.113.



partners were allowed to decide when and under what conditions women could work at night as this allowed equality to be achieved without sacrificing protection. Where guarantees could be introduced to ensure that women would not be penalised by working at night, both men and women are allowed to work at night, thus producing a situation of equality. Where it was felt that these guarantees could not be obtained, to have a rule that women work at night would not produce equality as they would be supplying their labour in different circumstances to those of men, thus producing inequality. Under this formulation of equality, which starts from the area to be regulated rather than from the formulation of the legal rule, it does not matter if the rule which emerges looks like an equal treatment rule. This is because the argument is that in employment practice it will operate to produce gender equality in working life. This formulation also views this system of regulation as a flexible way of producing equality: if the conditions under which men and women can supply night work become more similar, this can be reflected by a corresponding increase in agreements allowing female night work.

Furthermore, this formulation differs from a 'classic' equal treatment rule in deciding who is best placed to make equality decisions. A classic equal treatment rule is one which legislatively prohibits consideration of sex for the purpose of employment decisions, unless specifically excluded. For the sake of certainty and the reduction of possibilities to manipulate or avoid a more nuanced rule, the best overall method of dealing with the problems faced by women employees is seen as legislatively disallowing employers and other institutional actors on the labour market (for example, unions) to consider sex when making employment decisions. Therefore, the legislator decides that it is the best arbiter of when sex can be taken into account. It considers that the possibilities of abuse were this decision delegated would be too great. This approach, while it has many advantages, obviously carries with it the attendant disadvantage that in some situations it will aggravate certain problems women face on the labour market.

The legislator may, however, consider that even in those situations where the application of the classic equal treatment formulation may seem likely to produce some costs for women, it is still, ultimately, better to apply the equal treatment rule. We can identify at least two reasons for this. First, very few applications of an equal treatment rule produce only costs. Consequently, the legislator may decide that, because it is very difficult to distinguish between costs and benefits in

any particular situation, the best solution is simply to apply the equal treatment rule. Secondly, it may feel that as the easiest legislative solution in these cost-contested situations will be to retain the current system of regulation (for example, female night work), this cushioning of reality may not in the long-term be in the best interests of women as it carries the risk of legislatively endorsing or entrenching a reality which the equal treatment rule is being introduced to combat.

The equal treatment laws in France, Italy and the UK all evidently contain a classic equal treatment rule such as that discussed above. However, the legislator may decide that in certain cases, already clearly foreseeable, the application of the equal treatment rule would be much more likely to translate into costs rather than benefits for female employees. Obviously, this decision about what are defined as costs and benefits is made by the legislator and may be contested. Thus, it could be argued that the costs of female night work (due to the greater caring and domestic burden borne by many women, their unequal access to private transport, the reduction of public transport at night and their greater risk of being attacked or sexually harassed at work or while travelling to and from work)<sup>117</sup> do not outweigh the benefits (night time work bonuses and possibly more job opportunities).<sup>118</sup> Where the legislator makes a definite decision about costs and benefits (as we see clearly in the current regulation of women of reproductive capacity, for example) it will lay down a clear rule distinguishing women or a particular group of women. In the case of female night work, where the legislator makes a clear decision that the costs/benefit equation is tilted towards the first side of the equation, it will maintain a female night work prohibition. Here the legislator may feel that the changing of social reality is too long-term a prospect not to *cushion* women from its current effects, even at the risk that this cushioning may prevent the changing of social reality and may impede women from making certain choices about their lives which the legislator currently allows men to make. This is the situation prevailing, for example, in France before (and arguably after) 1987 and in Italy before 1977. It is also the position adopted in ILO Convention No.89.

It is not, however, the situation which has prevailed in Italy since 1977. Here, the legislator saw

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<sup>117</sup> What are counted as costs may of course change over time.

<sup>118</sup> Here, we are not looking at the benefits for employers and the national economy although evidently this played a key role in the rationale behind the introduction of both the SDA 1986 and the 1987 law in France.

the possibility that the cost/benefit equation might not always work to women's advantage, but decided first, that the legislator was not in the best position to analyse the specific cost/benefit balance sheet in each enterprise and possible changes in the general cost/benefit balance sheet over time and secondly, that permitting female night work to occur only when the social partners reach agreement gives unions the opportunities of reducing some of the costs or increasing the benefits.<sup>119</sup>

The advantages of this formulation are evidently its potential to respond and adapt flexibly to particular factual configurations and to *change* (as opposed to cushion),<sup>120</sup> to a greater or lesser extent, the factual configurations themselves. The disadvantages of this formulation are first, that it relies on the unions genuinely having negotiating power in the context of the proposed introduction of female night work.<sup>121</sup> Secondly, it banks on the unions being sensitive to the equality implications of proposals they may make conditional to concluding a female night work agreement with the employer. That this may cause problems can be seen in the challenge by female employees of union decisions to conclude night work agreements before the Italian courts.<sup>122</sup> It could equally cause problems where unions refuse to conclude night work agreements but the female employees concerned would like to work at night. We have seen that the Italian courts have sometimes allowed the dissent by female workers to negate the collective agreement permitting female night work, but that the current position adopted by the *Corte di Cassazione* is that the collective agreement, as the institutional mechanism chosen by the law to ensure that female night work is introduced under appropriate conditions, takes precedence over the dissent of even a majority of the female workers concerned.<sup>123</sup>

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<sup>119</sup> A hybrid formulation is found in the ILO Protocol of 1990 to the Night Work (Women) Convention (Revised) 1948. See *infra* Section 5.4.2.

<sup>120</sup> Change, in this context, means both making women's labour market/non-labour market balance more like that of men and that of men more like that of women.

<sup>121</sup> In the French context, an analysis of union negotiating strength in enterprises which introduced female night work post-1987 has demonstrated that the unions have little or no margin of manoeuvre when employers decide to introduce female night work. Bué, Roux-Rossi, *supra* at n.101 at 24, 'Dans leur action, ils participent plus d'une logique de gestion que d'opposition et font passer la défense de l'emploi avant celle des conditions de travail et de rémunération.'

<sup>122</sup> *Supra* at n.113 and accompanying text and *infra* at Section 4.4.2.

<sup>123</sup> *Supra* at n.113.

The acceptability of this type of 'delegalised' model - to use the description of the *Corte di Cassazione* - has been enthusiastically embraced by some and questioned by others.<sup>124</sup> This fits into a broader unresolved debate in Italian labour law concerning the enforceability of collective agreements *in pejus*.<sup>125</sup> More generally, Simitis has argued that the generally positive reception given to this type of delegation to the collective level may conceal the convergence of union and employer interests on a particular issue (for example, threatened production levels if female night work is not introduced) at the expense of the individual employees affected by the agreement.<sup>126</sup> What is not acceptable for employers to do alone is not automatically rendered acceptable by trade union agreement. This requires rethinking *whose* agreement (the women workers concerned as a group, each individual worker, workers with family responsibilities, unions and/or equality agencies) should be necessary in order to introduce night work and/or whether such an agreement should be subject to certain criteria being met before its introduction.

In any event, these various formulations of the possible relationships between equality and female night work, and the strength of the legal order proposing each particular formulation, were set on a collision course with each other. The collisions, examined below, took place chiefly in the courts and principally involved the embracing or rejecting of the ETD.

#### 4.3 The preliminary references

Parallel to the series of union challenges in France to the legitimacy of enterprise level agreements in the metallurgy industry,<sup>127</sup> a rather different litigation dynamic was also taking place. This involved the prosecution of employers who had breached the female night work ban by introducing female night work in enterprises where a branch level agreement had not been

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<sup>124</sup> See d'Antona *infra* at n.297 who views the collective derogation model positively. Less convinced is Ballestrero who argues against this model on several grounds, one of which is that it amounts to the legislator refusing to assume the responsibility for what will inevitably be contentious choices, see Ballestrero (1979), *supra* at n.96, at 258ff.

<sup>125</sup> See *infra* text accompanying n.288.

<sup>126</sup> Simitis, 'The Rediscovery of the Individual in Labour Law', in R.Rogowski and T.Wilthagen (eds) *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Kluwer Law and Taxation Publishers: Deventer/Boston, 1994) at 163ff.

<sup>127</sup> *Supra* at n.106 and accompanying text.

extended.<sup>128</sup> The courts making these decisions were the lowest courts in the French criminal court hierarchy (the *Tribunaux de Police*). On 23 January 1990, the *Tribunal de Police* of La Rochelle handed down a portentous decision.<sup>129</sup> M. Beyly, the manager of a photographic laboratory, was prosecuted under Art.L.213-1 Labour Code after a labour inspector noted that he had employed nine women at 4.20am. He argued that the criminal action was in breach of EC law. The tribunal, noting that the employer was clearly in breach of national law, examined the ETD. It observed that while equal treatment was the principle, national legislatures, probably basing themselves on Art.2(3) ETD, had allowed several legislative provisions which seemed contrary to the ETD to continue their existence. It went on to note that the ETD (Art.5(2)) further requires Member States to revise legislation when the concern for protection which had inspired them was no longer well-founded. As the original prohibition was designed to avoid women having to carry out particularly burdensome and insalubrious tasks, and modern-day industrial employment did not entail particularly heavy tasks and was carried out in excellent conditions, there was no longer any need to give women particular protection in this sphere. Turning to the application of Community law the Tribunal stated:

As it is the judge's task to ensure that French legislation conforms with Community provisions; that as, in the present case, this conformity was clearly not established, it was necessary to apply Community law; by reason of this application, the criminal act of which M. Beyly is accused is not properly constituted and the accused shall be fully acquitted

The approach adopted by the Tribunal has been rightly dubbed 'plus communautaire que la communauté'.<sup>130</sup> There was no recognition of the differential direct applicability of different types of EC law, no examination of how the ECJ has interpreted Arts. 2(3) and 5(2) ETD and no consideration of the ILO norm in this legal hierarchy.

While this decision was creating a stir in French doctrine, another *Tribunal de Police* (at Illkirch) had already, on 4 October 1989, referred the compatibility of French female night work provisions

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<sup>128</sup> That is, any enterprise which was not part of the metallurgy industry.

<sup>129</sup> Reproduced in *Droit Social* (1990) 471. See also Savatier *supra* at n.101.

<sup>130</sup> P. Rodière, Seminar, Florence, 19 April 1993.

with the ETD to the ECJ.<sup>131</sup> Alfred Stoeckel, the manager of Suma SA Obenheim, a video and cassette packaging company, concluded an agreement with the CFDT and CGC providing for five eight-hour shifts involving the whole workforce, including women, with a view to limiting redundancies in the company. The agreement stated that female night work, subject to certain conditions, would be possible on an exceptional basis and with the consent of those involved after a collective decision by majority vote of the female workforce. The Labour Inspectorate disagreed with the company's contention that it was covered by the metallurgy agreement and M. Stoeckel was prosecuted for infringement of Art.L.213-1 Labour Code.<sup>132</sup> He argued that this provision was contrary to Art.5 ETD and pointed to the ECJ's finding against France in 1988 for failing to take the necessary measures to eliminate inequalities prohibited by the Directive.<sup>133</sup> The Tribunal asked the ECJ whether Art.5 ETD was sufficiently precise to impose on a Member State the obligation not to lay down a legislative principle that female night work be prohibited.

Before the Court ruled in *Stoeckel* a second *Tribunal de Police* (at Metz) made a reference to the ECJ on 22 May 1991. M. Levy, a pork products manufacturer, the subject of criminal proceedings for having employed women at night, contended that French law was incompatible with Art.5 ETD. He maintained that the terms of the Directive, as far as night work was concerned, were not compatible with the ILO Convention. Therefore, for the State to conform, it had either to prohibit night work for men and women or denounce the ILO Convention. The *Tribunal de Police* asked the Court whether Articles 1-5 ETD must be interpreted as meaning that a national provision prohibiting night work only for women was discriminatory, taking into account Article 3 of ILO Convention No.89 which prohibits night work for women.

The third preliminary reference came from the Liège Labour Court in Belgium. Mme Minne, who lived in Belgium, worked nights in the hotel and catering industry in Luxembourg between 1986

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<sup>131</sup> This does not include the reference made in *Habermann-Beliersmann* concerning night work regulation for pregnant women which is discussed in Chapter 5 at text accompanying n.77.

<sup>132</sup> In the intervening period, the CGT sought an interim order from TGI (Strasbourg) prohibiting women working at night in the Obenheim factory. On 22 December 1988, the TGI dismissed this application noting that a serious dispute had arisen as to the fulfilment of the legally prescribed conditions for night work by women at Suma and concluding that the agreement could continue until the substantive issue had been settled as it had not given rise to a 'manifestly unlawful disturbance'.

<sup>133</sup> *Supra* at n.41.

and 1990. On moving to Liège, she stopped working and applied for unemployment benefit. The job centre (ONEM) refused to grant her benefit on the ground that she had declared that she was no longer prepared to work at night for family reasons. The Labour Tribunal held ONEM's decision to be unjustified on the grounds that Belgian legislation prohibited women in the hotel and catering industry from working between midnight and 6am. ONEM appealed this decision to the Labour Court which made a preliminary reference. Belgian law laid down a general prohibition of night work for men and women but contained differentiated systems of derogations, with derogations for women being determined by legislation and for men by the administrative authorities. Belgium was bound by ILO Convention No.89 at the time when the facts arose. The Labour Court asked the ECJ:

Does Article 5 [ETD] require a Member State, which lays down in its domestic law the principle of general prohibition of night work for male and female workers alike, to ensure strict similarity in the derogations provided for men and women workers (save where the need to treat men and women differently is justified) by refraining from introducing for men and women workers divergent systems of derogations differing primarily in respect of the procedure for the adoption of derogations and of the duration of the night work authorised, such as the systems resulting under the Belgian legal system?

Before the Court's rulings,<sup>134</sup> observations were made by several national governments and the Commission and evidently an AG's opinion was given in each case. It is useful to briefly examine these as they reflect attachments to different equality norms and formulations. Following this, we can then see which are accepted, rejected or ignored by the Court in its ruling. The arguments can basically be divided into two groups: arguments based on norms and arguments based on formulations of equality.

#### 4.3.1 Arguments on the norm

Arguments on the norm clustered around the existence of an pre-existing international norm which lays down a female night work prohibition. These arguments were raised before the Court in all three cases. The French government's principal argument in *Stoeckel* was not really based on an

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<sup>134</sup> Case C-345/89 *Criminal Proceedings against Alfred Stoeckel* [1991] ECR I-404; Case C-158/91 *Ministère Public et Direction du travail et de l'emploi v. Levy* [1993] ECR I-4287; Case C-13/93 *Office national de l'emploi (ONEM) v. Madeleine Minne* [1994] ECR I-371.

equality argument at all. Instead, it argued, it had done all it could, within the terms of the ILO Convention, through the use of collective procedures, to ensure that the prohibition was applied flexibly. The Italian government, though it was still bound by the ILO Convention, presented no arguments on this issue.

The other norm arguments focussed on the implications of Art.234 of the Treaty. The first paragraph of this Article allows Member States to honour obligations in international agreements entered into prior to the entry into force of the Treaty *vis-à-vis* non-EC states where these international obligations conflict with Treaty obligations. The second paragraph requires Member States to take all the necessary steps to eliminate the incompatibilities established.

The Commission in *Stoeckel* argued that France could not justify the maintenance of discriminatory legislation by relying on Art.234 since, as soon as the conflict with the EC equal treatment principle became apparent, France was bound to take steps to remove this incompatibility, either by extending the night work provisions to men or by denouncing the Convention, thus clearing a path for the removal of the prohibition. As it had failed to do so, the national court had to refuse to apply any law which was not in conformity with the ETD. In *Levy*, the Commission also argued that pre-Treaty agreements could not be relied upon to justify restrictions on fundamental human rights - such as equality - in the Community legal order. It further argued that as international law in this area was moving from sex-specific protection to a sex-neutral approach (citing in particular ILO Convention No.171 and ILO Recommendation No.178 of 1990),<sup>135</sup> the old Convention should be regarded as having been superceded.

AG Tesauro, who gave an opinion in all three cases, stated in *Stoeckel* that a Member State could not invoke Art.234 in order to evade the ETD's prohibition on discrimination since a Member State could fulfil its obligations under EC law without breaching the convention by, for example, extending the prohibition of night work to both sexes. He added that even if practical difficulties made it difficult to follow that course of action, the State concerned was required to denounce the convention, thereby ceasing to be bound by it. This did not really clarify what should be done in the case at hand, in that the AG failed to state what the *referring court* should do. However,

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<sup>135</sup> See *infra* Section 5.4.2.



in *Levy* and *Minne*, the AG, while maintaining his *Stoeckel* position, disagreed with the Commission's stance that under Art.234 - even prior to denunciation - a Convention contrary to a Treaty norm should not be permitted to prevent application of the Directive. Instead, he stated that the Commission's approach failed to conform with the letter, and still less with the spirit of Art.234, and would penalise those non-member countries whose rights Art.234 is intended to protect. Therefore he concluded that, while Art.5 imposes an obligation on Member States not to lay down a legislative female night work prohibition, Art.234(1) means that a national court cannot apply Art.5 ETD to the extent that it infringes the rights of non-member countries arising under ILO Convention No.89 which had been ratified prior to the entry into force of the Treaty.

#### 4.3.2 The Court on the norm

The most crucial point to note here is that the Court singularly failed to address the issue of the existence of the ILO Convention in the first of its night work judgments. Despite the fact that the French government's arguments were almost wholly based on the need to conform with the Convention and that both the Commission and the AG considered the ILO/ETD issue, a reading of the Court's *Stoeckel* judgment by itself leaves one completely ignorant of the fact that an international labour convention existed, prohibiting female night work, which was binding, not only on France, but on five other Member States.<sup>136</sup> In both *Levy* (where the ILO norm was specifically referred to in the national court's reference) and in *Minne* (where it was not) the Court considered the position of a Member State bound by ILO Convention No.89 and the ETD. It basically aligned itself with the AG's proposed reply in *Levy* in stating that the national judge is obliged to ensure that full effect is given to Art.5 ETD and must not apply any contrary provisions of national legislation *unless* the application of such a provision is necessary in order to ensure that the Member State concerned fulfils its obligations arising out of an agreement concluded with a non-member country before the entry into force of the EEC Treaty.<sup>137</sup> While, taken as a whole,

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<sup>136</sup> This can be compared with the Court's decision in *Oebel*, Case 155/80, [1981] ECR 1993 (a German night work ban in bakeries was not a quantitative restriction (Art.34 EEC)) where the Court referred to ILO Convention No.20 of 1925 despite the fact that this Convention had not been ratified in Germany and was ratified by only two Member States, Ireland and Luxembourg.

<sup>137</sup> The Court rebutted the 'Community fundamental rights trump international norms' argument, stating: 'It must be stressed that, although it is true that equal treatment for men and women constitutes a fundamental right recognised by the Community legal order, its implementation, even at a Community level, has been gradual, requiring the

this arguably provides a coherent response, the two year gap between *Stoeckel* (where it ignored the norm issue) and *Levy* had, as we shall see shortly, significant consequences for the reception of the judgment in the French courts and, combined with further Commission action, for the fate of ILO Convention No.89 in the Member States of the EC.

#### 4.3.3 Arguments on the formulation of equality

The French and Italian governments' submissions closely reflected nation-specific attachments to particular relationships between female night work norms, equality and employee protection. The French government framed its arguments only very obliquely in terms of equality, reflecting its attachment to the prohibition in the ILO Convention. Hence, the French argued that night work was taken out of the reach of the general equal treatment principle. Equality played an important but secondary role in determining how and when the prohibition should be applied (or not), in order to balance the need for protection with that of female employment opportunities.

The Italians, as we saw above,<sup>138</sup> demonstrated much less attachment to ILO Convention No.89, devising their own solution to what they saw as the equality/protection dialectic presented in the female night work issue. This was clearly reflected in their submissions to the Court in *Stoeckel*. They argued that, while an absolute prohibition of female night work might be incompatible with the Directive, given that no medical evidence exists that night work harms women more than men, a flexible prohibition reflecting societal conditions, the work environment and the work involved might be justified given, in particular, the greater exposure of women to the risks of sexual harassment and violence and their greater workload, given their family responsibilities. Thus, they argued that while the continuing prohibition was unacceptable to the extent that it involved discrimination, it was equally unacceptable to aggravate women's working conditions. Further, a flexible prohibition allowed a balance to be struck between these two imperatives. Perhaps surprisingly, both countries' submissions failed to place greater emphasis on the role of collective bargaining as a means of striking this balance. Even this, however, would have done little to veer

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intervention of the Council in the form of Directives, and that those Directives permit, temporarily, certain derogations from the principle of equal treatment'.

<sup>138</sup> *Supra* at n.98 and accompanying text.

the EC equality formulation off-course.

#### 4.3.4 The EC equality formulation and its application to night work

The ETD contains myriad textual possibilities to argue either that a female prohibition is justifiedly excluded from the equal treatment principle using Art.2(3) or, more interestingly, using Art.5(2), which requires Member States to take the measures necessary to ensure that:

those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be required to undertake the requested revision.

This could be used to argue that a justifiable concern for protection still exists, although the exact shape of the equality/protection dynamic may have changed, and that temporally graduated controls may be required to ensure that any protection provided fits and adapts adequately to changes (for better or for worse) in women's position on and off the labour market. Moreover, in combination with other sources, it could have been used to argue for a different outcome to the removal of the sex-differentiation.

However, the Court had already in previous judgments<sup>139</sup> clearly etched out what were good reasons for non-application of the classic equal treatment rule. These were exclusively related to genuine occupational qualifications, pregnancy, giving birth and the special relationship between a child and its mother in the post-birth period. As night work presents the same medical risks for men and women (except in the case of pregnancy and maternity) this does not provide a good reason for legislative sex differentiation.

The Court's response to the Italian government's two observations in *Stoeckel* was as follows. On the greater risks of violence at night to women *if they exist*, 'appropriate measures *can* be adopted to deal with them without undermining the fundamental principle of equal treatment for men and women'. So far as family responsibilities were concerned, 'the Court has already held that the

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<sup>139</sup> See Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651 and Case 184/83 *Hofmann v. Barmer Ersatzkasse* [1984] ECR 3047. See also Chapter 4 at Section 5.1.3.4 and Chapter 5 at Section 5.3.

Directive is not designed to settle questions concerned with the organisation of the family or to alter the division of responsibility between parents',<sup>140</sup> this being a 'preoccupation unconnected with the purpose of Directive 76/207'.

Therefore, the Court told the *Tribunal de Police* at Illkirch that Art.5 of Directive 76/207 is sufficiently precise to impose on Member States the obligation not to legislatively lay down the principle that female night work is prohibited, even if that is subject to exceptions, where male night work is not prohibited. The reasoning set out by the Court in *Stoeckel* was subsequently applied in *Levy and Minne*, where it stated that Art.5 ETD also 'precludes a Member State which prohibits night work for both men and women from maintaining divergent systems of derogations'.

It is worth noting the slippage between removing the rule's sex-differentiation and removing the rule (restricting female night work) itself in both the Court's rulings and, even more clearly, in the Commission's observations and the AG's opinions. By concentrating exclusively on whether night work provokes sex-specific risks for women, the Court never examined the risks night work presents for all workers. Hence the Court implicitly emphasised removing the rule rather than the rule's sex differentiation. In its observations in *Stoeckel*, the Commission said the following three things. First, it stated that, as regards night work, a female-only prohibition has often adversely affected female employment. It then stated that, if protection is necessary in particular jobs, then measures currently protecting women only should be transformed into sex-neutral protections. The former statement emphasises removing the rule, while the latter stresses removing the rule's sex differentiation. However, the Commission went on to conclude that the ETD required France to *abolish* the generalised prohibition of night work for women. While this can obviously be read as placing the emphasis on 'women', if this was what was really intended, a happier phrasing could have been achieved, here and in the Court's rulings, by saying, for example, that France was obliged to remove sex-differentiation from its night work regulation. The EC actors, therefore, tended to place the emphasis more strongly on removing the rule than on the rule's sex differentiation.

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<sup>140</sup> *Hofmann ibid.*

#### 4.4 Reception and circulation of the ECJ's night work jurisprudence: the dual seductiveness of the supranational norm

What is meant by the dual seductiveness of the supranational norm? The first prong of this seductive approach is the direct, immediate and compelling instructions given to the national court on what EC law ordains in a particular case, backed by the weight of supremacy jurisprudence and the Court's institutional position. This gives a supranational norm something that an international labour norm will never possess. The second is the simplicity and clarity of the Court's equality formulation: if it is not pregnancy or maternity but it is a sex-differentiated norm, then it is not equality and it has got to go. But would all the national courts succumb to the Court? Would some prove more susceptible than others to its supranational charms?

##### 4.4.1 Courts in referring countries: France and Belgium

The ECJ *Stoeckel* ruling was applied by the *Tribunal de Police* of Illkirch on 6 November 1991.<sup>141</sup> The CFTC joined the proceedings as a *partie civile*,<sup>142</sup> arguing that Community law could not be used to set aside French national law in this case as France was still bound by the ILO Convention which came into force before the EEC Treaty. Stoeckel demanded his complete acquittal on the basis that French law was clearly in breach of European law obligations. The Tribunal repeated verbatim the question it asked the Court and the Court's response. It then stated that it is the national judge's duty to set aside national law which is not in conformity with Community law. In this instance, in the light of the ECJ's response in *Stoeckel*, French law was clearly not compatible with EC obligations. On the ILO question, the judge noted that the Court's ruling was given following detailed consideration of the ILO norm by the French government, the Commission and the AG. It concluded that the Court, in its decision, must have taken into account the fact that an ILO convention, binding on France, existed. Therefore it was not up to the national judge either to reanalyse this part of the decision or to make recommendations to the French government to place its national law into conformity with its international obligations, whether they be Community obligations or other international obligations. Hence, the directly

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<sup>141</sup> Case reproduced in *UIMM Jurisprudence Sociale* No.93-559 at 96-97.

<sup>142</sup> See *infra* Section 5.3.

effective provisions of the ETD had to be applied and French law being incompatible with these, Alfred Stoeckel would be fully acquitted. This decision was appealed by both the Public Prosecutor and the CFTC on the grounds that Article 213-1 was the national application of the ILO convention, a superior source of law to the EEC Treaty, as it was ratified in 1954, and was therefore not affected by the Treaty provisions as Article 234 of that Treaty expressly states. This time, the Appeal Court did not even examine the ILO argument, simply stating that the ECJ had said that Article 5 was of direct effect and consequently that Article 213-1 could not be applied.<sup>143</sup>

With the benefit of hindsight it is clear that the contention of the CFTC and the Public Prosecutor was in fact correct, this being confirmed in the subsequent ECJ ruling in *Levy*. The French courts' perception of the significance of the non-discussion of the ILO norm in the Court's response illustrates the reluctance of the French national courts to depart from the strong clear response given by the ECJ, even in the presence of overwhelming legal arguments to apply the ILO Convention. The Appeal Court's decision can be further criticised for not having taken into account the fact that France had denounced ILO Convention No.89 seven months before their decision.

Better legal argumentation can be found in a decision made a week later by the Colmar TGI.<sup>144</sup> In this case, *Stoeckel* was used to settle the long-running conflict between the unions and the Timken company discussed above.<sup>145</sup> On 1 September 1992, shortly after the ECJ decision in *Stoeckel*, the company decided to extend female night work. The non-signatory unions immediately went to court, arguing that in the absence of new legal initiatives by Timken the emergency ruling made by the TGI in 1987 was still in force.<sup>146</sup> A process server (*huissier*) was designated by the court to ascertain breaches of the 1987 ruling by Timken, and he noted that female night work had occurred in September 1992. Timken argued that since 21 November 1987 the legal and factual situation has changed completely. They pointed out that the women who

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<sup>143</sup> CA Colmar, 19 November 1992 in *UIMM Jurisprudence sociale* No.93-559 at 97-98.

<sup>144</sup> TGI Colmar, 27 November 1992 in *UIMM Jurisprudence Sociale* No.93-559 at 98-100.

<sup>145</sup> See *supra* n.106 and accompanying text.

<sup>146</sup> The unions demanded that Timken paid the requisite fine which came to approximately £10,000.

voluntarily worked at night obtained various benefits.<sup>147</sup> They pointed to the Cassation Court's 1990 judgment stating that union opposition was not applicable to female night work<sup>148</sup> but above all they relied on *Stoeckel*. The unions replied with the ILO argument, but this time Timken responded that this Convention had been denounced by the French government in February 1992. The TGI stated that *Stoeckel* had radically redefined the problem. Its decision imposed an obligation on the French government to modify its legislation to create gender equality in the sphere of night work. This the French government subsequently did in stating, on its denunciation of the ILO convention, 'our legislation is no longer applicable'. The TGI then went on to say that the ECJ's *Simmenthal* judgment further makes it clear that a national court must set aside incompatible national legislation without waiting for its formal repeal by the legislature. Owing to these important changes in the legislation dealing with female night work, the TGI held that it could no longer be validly claimed that Timken had violated a legislative provision.

The Belgian referring court also applied the ECJ's ruling in the *Minne* judgment.<sup>149</sup> Here the Labour Court stated that as, when the facts of the case arose, Belgium was still party to ILO Convention No.89, Mme Minne had the right to the female night work protection regime. However, following the Belgian government's denunciation of the Convention, the Belgian legislation differentiating men and women in terms of night work regulation could no longer be applied. The Labour Court, while considering the jurisprudential principle that the disadvantaged group has the right to benefit from the more favourable treatment, concluded that the male night work regime was the more favourable and that this regime should therefore be extended to women.

#### 4.4.2 Courts in non-referring countries: Germany and Italy

In both Italy and Germany, *Stoeckel* had been argued before the courts in female night work cases

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<sup>147</sup> A reduction in their working week from 36.5 hours to 33.75 hours and an average weekly earnings increase due to shift bonuses of 8.3%.

<sup>148</sup> See *supra* Section 4.1.

<sup>149</sup> *Cour du travail de Liège*, 21 October 1994. Details of the decision and a commentary on its implications by Dominique De Vos are to be found in *Law Network Newsletter* No.12 V/5512/95/F at 22.

within one year of the decision being handed down. In Italy, the *Stoeckel* case (and subsequently *Minne*) was rapidly reproduced and commented on in a number of law journals.<sup>150</sup> These comments focused on the possible implications of the judgment for the Italian system of female night work regulation. A series of cases on female night work were decided by the national courts subsequent to the ECJ ruling in *Stoeckel* and many of these were also the subject of comment and reflection.

In Germany, within six months of *Stoeckel*, the Federal Constitutional Court (FCC) considered its implications for German female night work regulation.<sup>151</sup> Section 19 of the Working Hours Order 1938 prohibited the employment of women at night, subject to certain exceptions. In a 1980 judgment the FCC had held this rule to be constitutional because of the weaker physical constitution of women, that is, on the basis of biological differences between the sexes. In 1953, the FCC had also developed another basis on which to differentiate legitimately between the treatment accorded to men and women: the functional peculiarities of women (this relating chiefly to women's double burden of domestic and market work). In 1992, the FCC carefully analysed the content of the *Stoeckel* judgment and its implications in the German constitutional order and declared the prohibition of night work for women to be unconstitutional. What is extremely interesting about this case are, firstly, the wide range of equality formulations put before the Constitutional Court by many different groups and, secondly, the FCC's consideration of these arguments. The equality formulations put before the FCC were of a much richer diversity and depth than those presented before the ECJ in the night work cases.<sup>152</sup> The lower courts in this case

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<sup>150</sup> For *Stoeckel* see, for example, *Rivista italiana di diritto del lavoro* Parte II (1991) 707 and *Diritto del Lavoro* Parte II (1991) 347. For *Minne*, see *Diritto comunitario e degli scambi internazionali* (1994) 33 at 35. The *Levy* decision however seemed to attract little immediate interest in Italy, possibly because Italian legislation was already clearly in breach of ILO Convention No 89. See however Sciarra, 'Integrazione dinamica tra fonti nazionali e comunitarie: Il caso del lavoro notturno delle donne', Parte I *Diritto del lavoro* (1995) 152.

<sup>151</sup> Judgment by the Federal Constitutional Court, 28 January 1992, *Neue Juristische Wochenschrift* (1992) 964. The ILO issue was not relevant in Germany, since it had not ratified the Convention. I have taken information about and excerpts from the case from the following three sources. Extracts from the case are published in the *International Law Reports* Vol. 98 at 190-196 (focussing mainly on the Constitutional Court's discussion of the supremacy of EC law). The case is discussed in 8 *JCLL & IR* (1992) 180-188. Further lengthy quotes and an interesting discussion of the case can be found in Schewe, 'The Gender Dimension in German Labour Law: Time Revisited' in Y. Kravantou (ed.) *The Sex of Labour Law in Europe* (Kluwer Law International, The Hague, 1996).

<sup>152</sup> For example, the German Association of Female Lawyers argued that impeding women's access to certain professional activities was not compensated for by the protective aim of the prohibition. While it was true that women performed more domestic work than men, that did not constitute a functional discriminatory characteristic and the



had all held the night work prohibition to be compatible with the Constitution. After detailing the negative effects of night work for all workers (sleeplessness, increased nervousness, lower levels of efficiency) the FCC stated that no specific health risks linked to the female constitution had been ascertained. Rather, it was the fact that 'women who have to carry out domestic tasks alongside their night work cannot sleep or rest during the day. It is obvious that these women suffer particularly from a disturbance of the day night rhythm because of their night work.' However, a general prohibition on night work could not be based on this fact, as additional domestic tasks were not specific to the female sex. The court recognised that 'this double burden affects, in particular, women with children, who need care in so far as they are alone or their male partners leave the care of the children to them in spite of their night work. This is also true for single women, and, to a lesser extent, for men and women who share the domestic tasks and care for children.' The FCC concluded on this point:

These social facts are not sufficient to justify unequal treatment. The *undeniable need* to protect men and women who perform night work and have to manage a family can be better regulated by provisions which recognise these facts.

A similar argument was employed by the FCC in response to the greater risks at night argument. It stated:

The danger certainly exists, but it does not justify a prohibition on night work for women only. The State cannot perform its task to protect women from attacks in the street by limiting their right to work so as to keep them from leaving the house at night. Moreover, this is not a reason for a general prohibition on night work for all women. The danger can be prevented by providing transport to and from the workplace.<sup>153</sup>

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prohibition also affected those women who did not have double tasks. However, they argued that removing the prohibition on night work without replacing it by other legislation was also unconstitutional. Thus, the prohibition had to be maintained until it was replaced by sex-neutral legislation which protected all workers, marriage and family. Night work should be limited to an absolutely necessary level and prolonged night work should not be allowed. Regular night work examinations should become compulsory. Women with children under the age of six and workers with special health problems should not be allowed to work at night and childcare possibilities for night workers should be obligatory.

<sup>153</sup> The FCC also decided that the distinction between blue and white collar female workers was unjustified (under Article 3 para.1 German Constitution which prohibits legislation which treats differently the legal relations between different categories of persons where there are no justifications for such treatment) in that night work presented health risks for all and empirical evidence (cited by the FCC) showed that significant numbers of female white-collar employees work at night (7.6%) and therefore the argument that they were scarcely affected by night work did not hold.

In terms of the circulation of the *Stoeckel* judgment, we can see firstly, how well-apprised the FCC was of the content of the *Stoeckel* judgment and how, while its result was applied in the German legal order (prohibition contravenes equal treatment norm), the FCC reached this conclusion, unlike the French courts, through its own very different independent reasoning, based on evidence submitted to it by national actors. Moreover, it reached a number of conclusions which clearly diverged from what the EC actors (including the Court) saw as the scope of equality.

A number of possible explanations can be advanced for the differential reception of ECJ night work jurisprudence. Firstly, the differences between how *Stoeckel* was received in national courts can be explained partially by considering which national courts had to apply the judgment, with higher courts perhaps, on the one hand, feeling in a better position to take a measured view of the Court's jurisprudence and, on the other, being possibly more informed of the finer detail of when and why ECJ jurisprudence must be applied in the national legal order. Lower courts may be less likely to be aware of all relevant developments in ECJ jurisprudence, which may lead both to their not applying an ECJ judgment when they should have and applying them in cases where ECJ jurisprudence does not dictate straightforward application. Higher courts, possibly feeling in a more equal relationship of knowledge and power with their European counterpart, may be much happier to substitute their own reasoning for that of the Court's even when they agree with the Court's conclusion.

This, in turn, may be related to the system of female night work regulation in a particular country and its similarity to that condemned by the ECJ. Where a higher court considers that its system of night work regulation, while superficially similar to that considered by the ECJ, is in fact underpinned by substantially different equality rationales which it considers are worth pursuing, it may follow its own path rather than that mapped out by the ECJ. Both these tendencies, in lower and higher courts, can arguably be traced in post-*Stoeckel* female night work jurisprudence in Italy.

A further possible explanation is that lower courts are playing higher national courts and the ECJ off against each other. This may be particularly pertinent in the German situation, where lower

courts may balance up the potential outcomes of sending a case to the Constitutional Court or to the ECJ and make strategic decisions accordingly. These explanations are not mutually exclusive. Rather, they point to the need to individuate more carefully whether lower courts in *certain countries* (for example, Germany) or in *certain substantive areas* (for example, equal treatment or more narrowly, female night work) may develop a sufficient degree of knowledge in order to play this strategic reference game.

Following *Stoeckel* four female night work cases came before the Italian courts, all concerning the objection of female workers to a collective agreement signed by the unions and the employer authorising female night work at enterprise level. The women wished to argue in each case that their objection robbed the agreement of its legitimacy. All of these disputes took place between private parties (the individual women and private employers).

The first of these was decided by the *Tribunale di Catania* on July 8 1992.<sup>154</sup> The Tribunal, having cited a long string of ECJ decisions and various Italian authorities, decided that directives were directly effective and therefore Article 5 of the 1977 law was no longer applicable. Hence, the women's complaint could not be upheld.

Similarly, the *Pretura di Matera*, two years later,<sup>155</sup> decided that the Community law point (affecting the applicability of Article 5 of the 1977 law) was preliminary to a national law decision on the validity of the women's dissent. The Pretore stated that developments in EC law had now made it clear that precise and unconditional provisions of directives must be applied not only in disputes between the State and private parties (vertical direct effect) but also in disputes between two private parties (horizontal direct effect). Having drawn this (very surprising) conclusion, he stated that Article 5 of the 1977 law must be set aside. Without going into the details of the rules developed by the ECJ for when directives must be applied by national courts, it is clear that the Court has never pronounced that directives are horizontally directly effective. Furthermore, in

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<sup>154</sup> Published in 41 *Diritto & pratica del lavoro* (1992) 2811. Italian labour law cases go to a *Pretore* (judge sitting alone) at first instance, the *Tribunale* (3 judges) at second instance and finally to the *Corte di Cassazione* (5 judges).

<sup>155</sup> *Pretura di Matera*, 14 July 1994, No.168, *C. Calia v. ditta F.lli Quinto e Manfredi spa*, published in 4 *Diritto comunitario e degli scambi internazionali* (1994) 746.

both of these cases, the same result (invalidity of the women workers' objection) could have been achieved by interpreting Article 5 of the 1977 law so as to uphold the validity of the agreement.

This was the path followed by the Cassation Court in 1993.<sup>156</sup> This decision stands out, not only for its interesting analysis of the Italian system of female night work regulation in terms of equality, but also for its failure to acknowledge the ECJ's night work jurisprudence in its decision. Given the doctrinal attention paid to *Stoeckel*, the references in the decision to the ETD, and the pains the Cassation Court went to to show how the Italian system in fact achieved equality and had clearly moved away from the old-style prohibition model, we can legitimately doubt whether this was an accidental oversight.

Following this decision, however, the Italian Court of Cassation had a further opportunity to decide on the conflict between national sources and Community law in the context of female night work regulation.<sup>157</sup> The court heard an appeal by the women involved in the case decided by the Catanian Tribunal in 1992 where the directive had, without further ado, been applied by the tribunal to set aside the women's claim to have the right not to work at night.<sup>158</sup> The women presented two sets of arguments on appeal. One was that the Tribunal had not been asked to decide on the existence of the night work ban but on the validity and efficacy of the collective agreements. The second was that a provision of national law could not be set aside using EC law in a case involving two private parties. In any case, it was argued that Article 5 of the 1977 law was not in conflict with the ETD as it did not involve a prohibition, but rather a provision supporting collective bargaining as the means of establishing the conditions in which female night work was compatible with the female condition (although the legitimacy of limiting the provision to industrial establishments might be doubted). Even if there was a doubt as to the compatibility of Article 5 of the 1977 law with the terms of the ETD, given that the Italian provisions differed from the French provisions, a preliminary reference should be made to the ECJ. To apply

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<sup>156</sup> *Supra* at n.113.

<sup>157</sup> Cass. 3 February 1995, No.1271 in *Parte II Diritto del Lavoro* (1995) 8. For a comment on this decision see Santoni, 'La Corte di Cassazione e il divieto di lavoro notturno femminile nel diritto comunitario', *Parte I Diritto del Lavoro* (1995) 20.

<sup>158</sup> *Supra* at n.154.

Community law in this case to set aside the application of the national provisions would amount to an unconstitutional (in terms of Articles 11 and 37 of the Constitution) liberalisation by removing the limits placed on the employer to decide on the introduction of female night work.

Both sets of arguments were rejected by the *Corte di Cassazione*. On those concerning the application of EC law, the Court seemed to state that once a provision of a directive has been deemed sufficiently precise and unconditional, the question of its 'horizontal' direct effect, that is, whether it can be applied in disputes between private parties, is relevant only until the deadline for the implementation of the directive has lapsed. Following this date, the national judge has the duty to apply the relevant provision of Community law as though the incompatible national norm did not exist. The Court went on to draw dubious analogies between the French and Italian legislative models in a way which Sciarra has dubbed 'an abuse of the comparative method'<sup>159</sup> in order to conclude that Article 5 of the 1977 law is inapplicable because of its incompatibility with the ETD. The Court contended that the removal of the general ban for female industrial workers did not entail the absence of rules and limitations on the organisational powers of the employer. The general legal regime, and in particular the provisions and principles of the Constitution and the 1991 sex equality law (Law No. 125)<sup>160</sup> directly protected female workers, thus limiting the organisational powers of the employer. Hence, in 1995, unlike in 1993, the Cassation Court accepted that the EC equality rationale on night work superseded the Italian equality rationale on night work.

## **5. Outside the Courts: the EC, the Member States, the trade unions and the ILO**

### **5.1 The EC and the Member States**

The Community institutions (in particular the Commission and the Court) have conducted a continuous campaign to get female-specific night work regulation off the statute books of the

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<sup>159</sup> Sciarra *supra* at n.150 at 158.

<sup>160</sup> For a discussion of this law, see Ballestrero, 'New legislation in Italian equality law', 21 *ILJ* (1992) 152.

Member States since the beginning of the 1980s.<sup>161</sup>

The Court in *Johnston*<sup>162</sup> basically decided that all female-specific protective measures which did not fall under Art.2(3) breached the ETD. The second action programme on equal opportunities marked out female-specific protective legislation as an area to be actively examined by the Commission.<sup>163</sup> This resulted in the 1987 Commission Communication on protective legislation in the Member States. It divided protective legislation into three categories: anomalous provisions which were completely unjustifiable, humanitarian provisions and health and safety provisions. The French law preventing women working outside shops after 10pm fell into the first category; limits on working hours, employment in mines and on strenuous or arduous work as well as night work fell into the humanitarian category; substances creating reproductive hazards were placed in the third category. The Commission stated with regard to the second category:

It should be noted that the obligation to ensure equal treatment must be seen within the context of the need to improve working conditions set out in article 117 of the Treaty. Equality should not be made the occasion for a disimprovement of working conditions for one sex, and it would be insufficient to simply take away necessary protections which are currently limited to one sex.<sup>164</sup>

The Communication has often been compared favourably with the Court's stance *vis-à-vis* the issue of female night work legislation.<sup>165</sup> It is indubitable that the Communication does try to look at the broader effects of night work on workers. In particular, it recommended that the ban should be extended to all workers, coupled with equal derogations for both sexes; that failing this, the

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<sup>161</sup> See Action 3 of the 1982-85 Community Action Programme on the Promotion of Equal Opportunities for Women whose aim was 'to abolish in accordance with Directive 76/207/EEC unjustified protective legislation in the field of access to employment and working conditions and to promote equal standards of protection for men and women.' OJ/C186/3 1982, Bull EC 5-1982 and Bull EC 7/8-1982.

<sup>162</sup> *Supra* at n.139.

<sup>163</sup> Action 23(g), Employment, of the Second (1986-90) Community Equal Opportunities Programme where the Commission undertook to 'submit in this context...a report on the revision of protective legislation for women, so as to achieve a more even mix in employment; the problems of night work in particular will be examined, because the ban on night work often has a very negative impact on women's employment, for example in the new technologies.' See Bull EC Supplement 3/86 and Bull EC 6-1986.

<sup>164</sup> *Supra* at n.42 at 7.

<sup>165</sup> See Moreau *supra* at n.115, Pettiti *supra* at n.82, Deakin *supra* at n.68.

ban should be raised for women in the context of a general improvement in working conditions agreed with the social partners and, in the event of failure to reach agreement, the result should neither be a perpetuation of the ban nor a worsening of women's working conditions. However, the references to the UK action on female night work in the Communication reveal a lost opportunity by the Commission to make clear that abolishing female-specificity in night work regulation was in itself insufficient. Rather than pointing out that the approach adopted in the SDA 1986 was a wholly unacceptable way of modifying protective legislation, the UK's legislative activities *vis-à-vis* protective legislation were either noted approvingly or seen as not going far enough in that other pieces of protection legislation still remained on the British statute-book. As for the position taken by the Commission in 1987 to extend the ban to all workers, one wonders why this argument disappeared in its submissions before the Court in the night work cases. Furthermore, while the Commission's recommendations are highly commendable in terms of limiting night work *per se*, no attention was focussed on the specific issues of transport provision or the particular difficulties for those with family responsibilities who do work at night.<sup>166</sup>

The combination of Court (in *Stoeckel*) and Commission activity provided the main impetus for the second wave of denunciations of ILO Convention No.89 in February 1992. Following *Stoeckel*, the Commission issued a formal warning to France<sup>167</sup> stating that French legislation prohibiting night work of women in industry - in application of Convention No.89 - was inconsistent with the ETD. As ILO Conventions can only be denounced once every ten years, Member States which had not denounced in 1992 would have been bound by the Convention until 2002.

In March 1994, EC officials informed five Member States - France, Italy, Belgium, Greece and Portugal - that they were not moving quickly enough to dismantle national restrictions on female night work which the Court had ruled incompatible with the ETD and announced their intention to commence Article 169 proceedings against these Member States. The EC Social Affairs Commissioner Flynn, gave as reasons for this action the fact that, in a period of very high

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<sup>166</sup> See also the Council's Conclusions of 26 May 1987 on Protective Legislation for Women in the Member States of the EC, OJ 87/C 178/04.

<sup>167</sup> On 18 December 1991.

unemployment, forbidding women to work at night was contrary to the principle of equal treatment, could exclude them completely from this type of work and certainly excluded them from the high pay attaching to this type of work.<sup>168</sup>

These infringements proceedings have been pursued by the Commission.<sup>169</sup> On 13 March 1997, the ECJ held that France, by maintaining in force Art.213-1 Labour Code, had failed to fulfil its obligations under Art.5(1) ETD.<sup>170</sup>

## 5.2 The ILO, Convention No.89 and the Member States

It is fair to say that the last fifteen years has seen a revolution regarding the regulation of night work. This was one of the first areas to be regulated by international labour standards and a succession of conventions<sup>171</sup> have governed this area. At the beginning of 1982, only one Member State in the EC - Denmark - did not specifically regulate female night work and nine Member States - all except the UK and Germany - were party to ILO Convention No.89.<sup>172</sup> In 1987, only approximately twenty countries in the world had no legislation prohibiting, in some form or another, night work for women.<sup>173</sup> By the end of February 1992, no Member State of the EC was a party to ILO Convention No.89. These denunciations took place in two waves: first, a 'voluntary' wave<sup>174</sup> in 1982 and secondly, an 'EC-propelled' wave a decade later. In 1992, the

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<sup>168</sup> *Europe*, No.6185, 7-8 March 1994, 13.

<sup>169</sup> Hence, a Reasoned Opinion was addressed to France on 8 November 1994.

<sup>170</sup> Case C-197/96 *Commission v. France* judgment of 13 March 1997, not yet reported. The French Minister for Employment has announced that he will consult with the social partners on the conclusions to be drawn from the ECJ judgment. This consultation will take place within the framework of the transposition of the Working Time Directive *infra* at n.196; information taken from 279 *EIRR* (1997) 6.

<sup>171</sup> No.4 in 1919, No.41 in 1934 and No.89 in 1948.

<sup>172</sup> The UK was a party to the first two ILO conventions on female night work. It denounced ILO Convention No.41 on 4 October 1947 and did not ratify Convention No.89.

<sup>173</sup> *Conditions of Work Digest*, Volume 6, 2/1987, 12.

<sup>174</sup> Three Member States voluntarily denounced in 1982. Ireland stated that such prohibitions discriminated against women. In Luxembourg, the government repealed the law in line with requests by employers', workers' and women's associations which argued that the concerns which had inspired the Convention no longer existed. The Netherlands also denounced the Convention on the ground that it constituted a barrier to female employment.



ILO Committee of Experts registered eight denunciations unaccompanied by the ratification of a new Convention. All of these concerned the female night work convention and seven were linked with EC developments in this area.<sup>175</sup> Belgium gave no reason for denouncing the Convention. Greece, Portugal and Italy all referred to the need to bring national law or international commitments into line with EC commitments. Greece further stated that night work conditions had improved considerably while Portugal stated that Convention No. 89 was no longer relevant and could impair equality between the sexes. Spain made no mention of EC requirements and stated that the provisions of the Convention were not in keeping with Article 14 of its Constitution which lays down, as a fundamental right, the prohibition of all forms of sex discrimination.

France did not state any arguments based on irrelevance or equality. It stated that it was denouncing the Convention for exceptional reasons, related with a serious risk of incompatibility in its international commitments. It referred to the *Stoeckel* judgment and the Commission letter.<sup>176</sup> Switzerland also denounced the Convention on the grounds that its main economic competitors, particularly the EC Member States, were not bound by the Convention or were in the process of freeing themselves from their obligations and that its competitiveness would be impaired if it were to forego denouncing the Convention. Two Member States, France and Switzerland, explicitly expressed an interest in ratifying Convention No.171<sup>177</sup> in their denunciations.

The Committee of Experts expressed its concern at these denunciations and the hope that all the governments concerned would examine the possibility of ratifying Convention No.171 to ensure the protection of all female night workers. Disquiet at the role the EC played in triggering the denunciation of a Convention which preexisted the EC's existence was expressed on several

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<sup>175</sup> Cuba is the non-EC linked denunciation; see Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 79th Session 1992, Report III (Part 4A), 9ff.

<sup>176</sup> *Supra* at n.167.

<sup>177</sup> See *infra* Section 5.4.

occasions at ILO level.<sup>178</sup>

### 5.3 French unions and female night work

What is noteworthy is the huge reaction the denunciation of ILO Convention No.89 provoked in France. This stands in stark contrast with the silence which accompanied the repeal of female-specific night work legislation in the UK. The issue was the subject of extensive national media coverage. It is difficult to imagine the first four pages of a British national newspaper being exclusively devoted to the denunciation of an ILO Convention on female night work.<sup>179</sup> The attention of the media focussed on two chief issues: the constraints placed on the French government by the EC (the ECJ decision and the formal warning of the Commission); and the reactions of the French unions. While much of the press coverage suggested that the removal of a female-specific night work ban might be no bad thing, it concentrated mainly on highlighting the unions' strong opinions on the issue.

The fact that the unions whipped up most of this media attention is noteworthy for two reasons. First, it demonstrates the unions' capacity to effectively and vocally mobilise around an equality issue. The CFTC organised a press conference immediately before the decision of the *Tribunal de Police* of Illkirch following the preliminary reference. This highlighted the issues at stake,<sup>180</sup> and provided regional branches with a technical dossier which contained an outline of the current legal position<sup>181</sup> and a litigation guide outlining the precise procedural steps to be taken before

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<sup>178</sup> See ILO, Governing Body, 252nd, 253rd and 254th session in March, May-June and November 1992 respectively.

<sup>179</sup> *Libération*, 28 February 1992, 1,2,3 and 4; see also *Le Monde*, 5 February 1992; Y.Roudy, 'Travailler la nuit', *Le Monde*, 27 February 1992; 'Le travail de nuit des femmes va être autorisé', *Le Monde*, 28 February 1992; *Les Echos* 22 January 1992; 'Travail de nuit des femmes: Paris dénonce la convention de l'OIT', *Les Echos*, 27 February 1992; 'Travail de nuit: les femmes reviennent', *Le Quotidien*, 27 February 1992; *Le Quotidien*, 28 February 1992; 'Travail de nuit des femmes: les syndicats divisés', *Le Figaro*, 28 February 1992; *Le Parisien*, 7/8 March 1992; *Les Dernières Nouvelles d'Alsace*, 28 February 1992; *Alternatives Economiques*, March 1992.

<sup>180</sup> Communiqué, CFTC, Paris, 9 September 1991.

<sup>181</sup> The legal point was that the denunciation did not take effect for one year, that is, until February 1993. The aim was to prevent female industrial night work until that date.

different courts to prevent female night work being introduced.<sup>182</sup> Feminist groups and CFDT dissidents created a collective 'Travail de nuit, ça nuit' which held a protest vigil in Paris.<sup>183</sup> The tenacity with which the CGT and the CFTC clung onto the female night work ban was clearly revealed in the refusal of these two unions to sign the 1989 national collective agreement on employment equality. One of the objectives of this agreement was the 'removal of all obstacles which could prevent women's access to the same jobs as men'. Viewing this objective as being designed to place a question-mark over the night work ban, these two unions refuse to sign.<sup>184</sup> Of the four main union federations in France, three were vehemently opposed to the disappearance of the female night work ban and only the CFDT argued that its disappearance was positive in that it opened a space to create adequate legislative protection for all night workers.

Before looking at the particular positions adopted *vis-à-vis* French female night work regulation by each of the unions, it is worth stressing the implications of this institutional mobilisation by French unions around the night work ban for an overall analysis of equality mobilisation. First, it shows that unions in France are perfectly capable of exploiting and understanding national, supranational and international substantive norms, and legal procedures in order to promote a particular vision of what equality is or, more precisely in this case, what it is not. Secondly, this is the only equality employment issue around which French unions have mobilised to any significant extent. The rest of this thesis has revealed a level of engagement by French unions with either national law or supranational developments in the sphere of equality which approaches zero.<sup>185</sup> However, I feel that the only firm conclusion that can be drawn from this is that it disproves arguments that the French unions have not exploited the possibilities for litigation in the 1983 law because they do not know how to litigate or organise tactical opposition to particular courses of action which require careful navigation through the national, supranational and international norms governing female employment. It would be tempting to extrapolate from this

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<sup>182</sup> Lettre Confédérale No.459, 27 April to 3 May 1992, Dossier Technique, 'La CFTC et le travail de nuit des femmes dans l'industrie'.

<sup>183</sup> Bref Social No.11176, 10 April 1992, 2.

<sup>184</sup> See CFTC, Lettre confédérale No.399, May 1989; A. Jobert, *Négociation collective et promotion de l'égalité en France*, April 1993, rapport pour le Bureau International du Travail, 12.

<sup>185</sup> See, in particular, Chapter 2 at Section 6.1.

to argue that the French night work example demonstrates that the stimulation of union-backed equality litigation is determined merely by whether the unions in question decide whether a certain equality issue 'matters' or not. I think, however, that this reading ultimately underestimates the differences between equality litigation on different issues. The jurisprudential setting-aside of a national female-specific labour norm and the challenging of an international labour convention under the EC equal treatment rubric is a very 'visual' and potentially 'destructive' application of equality. This is arguably easier for unions to recognise and *react against* than the proactive, creative approach needed to *construct* other types of equality litigation (such as equal value, direct or indirect discrimination arguments).

It could also of course be argued that French unions have not mobilised around other equality issues because they endorse, more or less explicitly, particular views about the respective roles men and women should play in society, for example that women and men should not work together at night for moral reasons, that women should be at home looking after their families or that, in times of high unemployment, women should exit the labour market. To ascertain to what extent, if at all, French unions' opposition to the removal of a female night work ban is attributable to such conceptions of female workers, their grounds for opposition must be examined more closely.

The three unions which vigorously opposed the disappearance of the female night work prohibition - the CFTC, CGT and FO - advanced different reasons for their opposition.<sup>186</sup> The CFTC criticised the ECJ's conception of equality for treating workers as identical rather than as men and women, or as fathers and mothers. The contending conception of equality proffered by the CFTC is 'égalité de complémentarité entre l'homme et femme'. This perspective 'implique qu'on leur reconnaisse des droits particuliers, en raison notamment de leur rôle spécifique dans la cellule familiale'.<sup>187</sup> The CFTC argued that the specific role of women was to be at home at night with their children. In its opinion, night work should be reduced for all but women should be given a priority dispensation from night work obligations. It chastised government policy for not

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<sup>186</sup> Drawn from the media responses *supra* at n.179.

<sup>187</sup> Chalmal (CFDT legal service), 'Le risque de banalisation du travail de nuit des femmes', *Le Monde*, 5 February 1992.

creating a financially viable alternative for women who wish to leave the labour market and care full-time for their children.

The CGT, in their published reactions to the decision, concentrated instead on the argument that it was unacceptable to use equality as a weapon to lower the protection of workers. The CGT viewed the female night work issue (including the 1987 modifications) as part of a broader employer offensive to obtain total liberty to organise hours of work; including extra shifts, four day weeks and Sunday working, where the 'voluntary' nature of the employee's agreement to carry out these working hours exists only on paper.

The FO, whilst making it clear that they did not believe that women need any special protection, argued that it was wrong to denounce the Convention because it sidestepped the real issue and meant that an optimal opportunity was missed for evaluating the dangers of night work for men as well as women. Thus, FO saw the denunciation as robbing the unions of a bargaining platform from which they could have negotiated the regulation of night work for all workers. They stated, 'si la confédération a signé l'accord sur l'égalité professionnelle entre les femmes et les hommes, il tient cependant à préciser que l'interdiction du travail de nuit n'est pas une discrimination mais un acquis. L'objectif est de limiter pour tous le travail de nuit.'

By contrast, the CFDT argued that removing the prohibition was not socially regressive as the lifting of this theoretical prohibition would create a much needed space to regulate and limit night work for all night workers, to obtain real guarantees and compensation for those working at night, particularly in terms of a reduced working hours and pay, and would give unions a clearly defined role in regulating the utilisation of night work. It demanded the ratification of Convention No.171 by the French government and argued that changes in French society meant that a protective conception of women on the labour market could no longer be sustained and that EC developments and the actions of other Member States made it essential to denounce in 1992 rather than leaving the issue in limbo for another ten years.

It is essential to view these different viewpoints against the backdrop of legislative openings for alternative night work regulation in France during this period. From January 1992, the French

Labour Minister, Martine Aubry, commenced talks with the social partners with a view to amending the Labour Code's night work provisions.<sup>188</sup> Shortly after denunciation, a press conference was held by the Labour Ministry on the subject of night work.<sup>189</sup> The government position on night work was that the new draft law would be 'a draft to protect all night workers. It is not a draft law which will liberalise night work as I, like the rest of the government, am against the normalisation of night work.'<sup>190</sup> The draft law was modelled on ILO Convention No.171 which the French government stated it wished to ratify. However, the draft ran into stiff union opposition and by the end of 1992 it had been placed on the legislative backburner. 1993 brought in a new administration, but no new initiatives on night work regulation. As a result, night work in France, male or female, is currently unregulated. It is difficult to pinpoint precisely why Aubry's draft law failed to get started in the legislative process. It would seem that the unions who opposed the draft law wanted to extend the 1987 prohibition and double derogation model to all night workers, partly because they viewed it as unacceptable for a new law to change in any way the protection of female workers in industry. Disagreements were *not based* on the necessity to provide transport or child care facilities or to regulate night work for workers with family responsibilities. Rather, disagreement focussed on which agreements were necessary to introduce night work, whether night work should benefit from both reduced working hours and night time bonuses (rather than the and/or choice in the draft) and whether greater protection should be reserved for pregnant women.<sup>191</sup>

#### 5.4 Legislative developments: filling the holes left by repeal?

It is clear that a sea-change has taken place in the regulation of female night work. On the ground

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<sup>188</sup> Bref social No.11112, 30 January 1992, 2.

<sup>189</sup> Bref social, 13 March 1992, 1.

<sup>190</sup> Bref social No.11157, 16 March 1992, 2. See now, the possibility of new governmental initiatives in the wake of the Court's condemnation of France in March 1997 *supra* at n.170.

<sup>191</sup> Subsequent agreements on night work in France show few signs of dealing with these issues. The Bosch électronique agreement (introduction of a four shift system) allows workers to move onto day work for medical reasons, Législation sociale No.6746, 21 October 1992; the Citroën Rennes agreement allows women (but not men) to move to day work if night work poses problems in terms of family responsibilities or health, Bref social No.11456, 7 June 1993, 2; the Talbot Poissy agreement permits women returning to work following maternity leave to be dispensed from night work until the child is two years old, Bref social No.11498, 11 August 1993 (Légén soc. No.6894).

that it is contrary to an equal treatment principle, the EC has made concerted and successful attempts to make prohibitions on female night work inoperative in the Member States of the EC. In those Member States - such as the UK - which abrogated a female night work prohibition without any prodding from the EC, equal treatment was also employed to justify the removal of the prohibition.

It is difficult to argue that a prohibition on female night work is compatible with an equal treatment rule. The word prohibition immediately conjures up a vision of complete exclusion, even if the female night work systems examined in this chapter have shown this not to be the case in practice.<sup>192</sup> If female night work regulation was not born as, it has certainly become a particularly ill-targeted employment norm. As such, it was highly vulnerable to the equal treatment 'treatment'. It is both overinclusive and underinclusive. If a list of objectives central to supporting the existence of regulation of night work were drawn up, it would probably look like this:

- (1) the health and safety of night workers;
- (2) the needs of night workers with family responsibilities;
- (3) inadequate transport facilities to deal with the higher risk of exposure to attacks - sexual or otherwise - at night;
- (4) recognition of the social deprivation experienced by night workers.

Regarding the first objective, female night work regulation did not protect the health and safety of most female night workers (in the majority of countries it covered only industrial establishments) and protected the health and safety of no male night workers. The same applies to the second objective. Moreover, legislatively enshrining the women as the only worker with family responsibilities is overinclusive as it includes women who do not have family responsibilities and excludes men with family responsibilities. It is also unacceptable in symbolising 'woman' as the principal carer. Furthermore, it may be much less effective than other envisageable measures in alleviating the problems faced by night workers with family responsibilities. It does not seem that the lifting of a female-specific night work ban was often made conditional on providing alternative childcare arrangements or on giving mothers the option to opt out. As

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<sup>192</sup> See *supra* Section 2.1.1 (UK), and Section 3.3 (UK, France, Italy).

regards the third objective, the exclusion of some women from night work does not seem a particularly good way of dealing with the problems of transport and sexual attack which could affect all night workers. As regards the fourth objective, female night work regulation is underinclusive.

Therefore, there are basically two types of argument against female differentiated night work regulation. The first is an underinclusion argument (the non-inclusion of service workers and male industrial workers) which is hard to refute in all the countries examined except perhaps Belgium.<sup>193</sup> This type of argument is based on the limited coverage of the legislation. The second type of argument is based on the internal effectiveness of this legislative model to realise the objectives outlined above. In this regard, it would seem that unless complete respect is to be given to managerial prerogatives, a prohibition/derogation model, in particular, where the practical handling of derogation is handled collectively does seem promising. However, much will depend on the degree of control those controlling the derogations can - or are prepared to - exercise. Hence, the collective introduction of night work in France and Italy seems to have produced guarantees for more women than the lax administrative control exercised in the UK. However, the fact remains that this type of model seems a necessary but insufficient condition for realising the four objectives outlined above. In particular, there are better ways of making more *explicit* the need to provide health and safety protection, recognition of the problems night workers with family responsibilities face, transport provision and recognition of social deprivation. The ill-focussed nature of female night work regulation led to its downfall: it protected only some women from non-female specific risks.

However, this does not alter the fact that female night work regulation protected some women - particularly when strong conditions were placed on the lifting of the prohibition - and that some of the problems created by night work, while not female-specific, certainly affect women more than men. This applies particularly to the problems of workers with family responsibilities and the dangers of sexual attack. Moreover, while it is certainly true that female-specific night work regulation may have prevented the hiring of women for some particular jobs, it is equally true that it may have prevented the dismissal of women who refused to work at night given that refusal to

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<sup>193</sup> *Supra* at Section 4.3.



work a certain pattern of working hours is often treated as a justifiable ground for dismissal.

The two preceding paragraphs demonstrate that, while female night work regulation is ill-targeted, even badly targeted measures achieve some of the objectives advanced to justify their existence. My disagreement with the application of equal treatment to female-specific night work regulation in the UK and by the EC institutions is that, while they take into account the former set of arguments, in arguing for the abolition of female-specific night work regulation, they completely ignore the latter set of arguments. It is important to set out more precisely the different implications of this assertion for different actors in the night work debate. Thus, it does not imply that the ECJ should have set out in *Stoeckel* a series of norms governing night work for all workers in the EC. This is a legislative and not a judicial task. What it could - and should - have done is to emulate the German FCC model<sup>194</sup> and explicitly recognise the negative effects night work has on the health and safety of all workers, outline the increasing dangers of negative effects on night workers with family responsibilities - who are mostly women but may also include men - and the problem of adequate transport provision, which impacts particularly heavily on women, and called on the European legislature to act.

Similarly, the Commission, if it wishes to remove the female-specificity of night work regulation, should attempt to ensure that the objectives purportedly achieved by the old legislative model are still achieved, albeit in a manner which conforms with an equal treatment norm. This requires legislative proposals for night work regulation incorporating these objectives as sex-neutrally formulated legislative standards. In tandem with taking infringement proceedings against Member States which have not removed female-specific night work regulation, it should at least have recommended that the objectives these regulations purportedly achieved were achieved in another way. Peremptory demands for removal of female-specific night work regulation are unacceptable on their own and overlook the fact that good night work legislation may take time to formulate.

On the other hand, some of the unions and the Member States can be criticised for concentrating too much on the fact that even badly targeted measures achieve some of the objectives advanced to justify their existence and for failing to look at the fact that female night work regulation is ill

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<sup>194</sup> *Supra* at n.151.

targeted. The fact that female night work regulation may have sporadically achieved some of its objectives is not a sufficient reason for refusing to reexamine the current regulatory framework in an attempt to articulate it more closely with the needs of workers.

Statements by the EC institutions could have given a useful impetus to, and helped shape the debate on, reform in Member States. When a legal void is created in the name of equality or negative integration, those responsible for its creation should also play some role in helping to fill that void. Here, doctrine can play a particularly important role in imagining new forms of regulation and protection.<sup>195</sup>

Fortunately, this discussion does not have to remain at the level of speculation. Two years after the *Stoeckel* decision, an EC directive on the organisation of working time (including night work) came into existence. At international level, in 1990 alternative night work regulation options were provided in a Protocol to Convention No.89 and a new Convention on night work (No.171), accompanied by a Recommendation (No.178). Furthermore, every Member State has made some sort of response to female night work regulation. Repeal (as in the UK) or non-application (the current situation in France) of female night work regulation must be included and evaluated like any other response. I wish to evaluate these different responses to see how or whether they fulfil the four objectives outlined at the beginning of this section. As the problems faced by workers with family responsibilities and the risks of nocturnal sexual attack affect more women than men - and were the reasons advanced for maintenance of female-specific regulation - particular attention will be focussed on legislative efforts to fulfil these objectives. Obviously, these objectives could be fulfilled in a number of different ways: by giving workers with family responsibilities the right to freely transfer between day and night work, depending on what particularly suits their organisational requirements in different periods; the classification as unfair of a dismissal of a worker who cannot work a certain pattern of hours because of family responsibilities; the provision of child care facilities either in the night worker's home or near the place of work. The adequate transport issue could be addressed by means of co-ordination with public transport services, the provision of an employer-supported minibus service or by making car loans available to night workers. Thus, there is no shortage of possible options to fill the gaps left by repeal of

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<sup>195</sup> See *infra* Section 6.

female-specific regulation on grounds of incompatibility with equal treatment norms. Let us turn to what the texts say.

#### 5.4.1 The EC Working Time Directive

The EC Working Time Directive has had a bumpy legislative passage.<sup>196</sup> Like the Pregnancy Directive,<sup>197</sup> this directive uses Article 118a (health and safety) of the Treaty as its legal base, a choice which has been unsuccessfully challenged by the UK government before the ECJ.<sup>198</sup> I do not intend to examine in any detail the health and safety protection afforded night workers in the directive.<sup>199</sup> Provision is minimal and, by virtue of Article 17, subject to almost unlimited derogation possibilities. Article 8 states that normal hours of work for night workers may not exceed an average of eight hours in any 24 hour period and this eight-hour period may not be averaged for night workers whose work involves special hazards or heavy physical or mental strains. Article 9(1)(a) entitles workers to a free health assessment before moving onto night work and regular health assessments thereafter and Article 9(1)(b) requires Member States to ensure that night workers suffering from health problems recognised as being connected to the fact that they perform night work are transferred wherever possible to day work to which they are suited. There is not even the vaguest allusion to transport provision or provision for night (or shift) workers with family responsibilities.

However, as Directives in the social field often end up looking considerably thinner and weaker than the original proposal, it is necessary to look for signs of recognition of these issues at earlier stages in the Directive's history. In the original Commission proposal<sup>200</sup> there is once again no mention of any of these issues. This can perhaps be attributed to the fact that the proposal was

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<sup>196</sup> The full title of the Directive is Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, OJ/L307/18 (13.12.93). The Directive's implementation date is 23 November 1996.

<sup>197</sup> See Chapter 5, Section 3.2.

<sup>198</sup> Case C-84/94 *UK v. Council of the European Union* [1997] IRLR 30.

<sup>199</sup> For a detailed analysis of the content of the Working Time Directive, see B. Bercusson, *Working Time in Britain: Towards a European Model, Parts 1 and 2* (Institute of Employment Rights: London, 1994).

<sup>200</sup> OJ/C254/4 (9.10.90).

submitted prior to the commencement of the ECJ night work jurisprudence. However, it is also true that the *Stoeckel* decision was already in the pipeline and that the Commission (bearing in mind its 1987 Communication) could have acted on transport and family responsibilities to begin to phase in alternative night work protection for problems which impact particularly severely on women who work at night. These issues could furthermore have been fitted into a health and safety rubric fairly comfortably. The ECSC, which adopted an opinion on the Proposed Directive before the end of 1990<sup>201</sup> did refer to workers with family responsibilities but in a way which was scarcely intended to advance regulation at European level. They stated:

The ILO night work standards of June 1990 should be taken into consideration to a much greater extent. The question of combined work and family responsibilities should be covered and reflected in working time arrangements. In keeping with the principle of subsidiarity, Member States must retain the option of maintaining existing restrictions on night work. This applies particularly to night work by woman employees.

The European Parliament's amendments to the original proposal under the co-operation procedure are worth examining in some detail as they represent a hybrid of different regulatory methods of dealing with women's night time employment. The Parliament inserted a new recital based on respect for ILO Conventions. Where night work is concerned, rather than referring to Convention No.171 or the 1990 Protocol to Convention No.89 they stated, 'whereas with regard to night work for women, Convention No.89 on night work for women in industry should be implemented'. They also inserted a new recital,

whereas greater degrees of flexibility must be introduced as a matter of urgency into daily, weekly and annual working time in order to enable men and women to reconcile their work and family life.

In the text itself, a clause was inserted which prohibited night work in principle but allowed collective derogation so long as this respected the provisions of the directive and was approved by the national health and safety authorities. The new Art.6(b) stated

Member States shall adopt the necessary measures to ensure that a worker is not forced to perform shift or night work. If an undertaking wishes to alter the work organisation by introducing or extending the system of shift work, night work

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<sup>201</sup> Opinion on the proposal for a Council Directive concerning certain aspects of the organisation of working time (91/C/60/09) OJ/C60/26 (8.3.91).

or work according to a specific rota, it shall be required to conclude an agreement with the workers' representatives with regard to the arrangements on working time, the measures to be adopted concerning the health and safety of workers, transport to and from work, child care and alternatives which do not involve loss of status for those workers already employed who do not opt for these new arrangements on working time.

The new Art.6(c) stated that no worker's working-time arrangements may be altered without his or her agreement. Finally, the new Art.7(a) stated, rather ambiguously, that 'the assignment of women to night work shall not prejudice the guarantee of equal treatment between men and women at work or lead to increased discrimination against women'. It is difficult to view the Parliament's amendments as a coherent programme of protection for night workers, especially those with family responsibilities. In particular it is difficult to articulate the reference to Convention No.89 in the Preamble with the espousal of a collective derogation model in the main body of the proposed directive. Reference to the ILO Protocol or the new Convention would have fitted better with the system of protection extant in the majority of Member States at that time.

The Commission's amended proposal of May 1991 did not include any of these amendments.<sup>202</sup> Furthermore, following the *Stoeckel* judgment, the Parliament passed a Resolution which called for negotiations to be reopened on the directive and 'deplore[d] the carelessness of the Commission in permitting a situation to arise in which no night working legislation exists at Community level, thus incurring the risk of deregulation of night working, since Member States are no longer required to respect minimum international standards'.<sup>203</sup> Given the complete failure by all the EC institutions - save the Parliament - at any stage of the Working Time directive's legislative passage to consider the consequences of the EC-propelled disapplication of national and international female night work protection, one cannot draw much comfort from the Social Affairs Commissioner's statement in March 1994 on the announcement of the intention to commence infringement proceedings against those Member States whose legislation still contained female specific night work regulation:

La Commission est consciente des désavantages liés au travail de nuit et de la nécessité de promouvoir une législation au niveau européen laquelle définirait les conditions auxquelles le travail de nuit peut être exercé tant pour les hommes

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<sup>202</sup> OJ/C124/8, 91/C 124/06, (14.5.91).

<sup>203</sup> Resolution on night working and the Denunciation of ILO Convention No 89, OJ/C125/234 (18.5.92).

que pour les femmes. La directive sur le temps de travail constitue un premier pas en ce sens.<sup>204</sup>

#### 5.4.2 ILO: the 1990 night work standards

Work on providing alternative night work protection at international level has been going on since the mid 70s.<sup>205</sup> In 1990, this culminated in the production of a Protocol to the 1948 Convention, a new Convention and a Recommendation. The Protocol establishes a collective derogation system from the female night work prohibition laid out in the 1948 Convention which falls somewhere between the French, Italian and UK models, in that it allows derogations through agreements at branch or enterprise level, unlike France, but sets out a more explicit matrix of what is necessary to derogate, unlike Italy. Like the UK, it allows administratively authorised derogations, although consultation with workers' representatives is required and the derogation must be for a specified time period. Furthermore, if the administrative authority option is employed, before authorising the derogation, the administrative authority must ensure that 'adequate safeguards exist in the establishment as regards occupational health and safety, social services and equality of opportunity and treatment for women workers.' This Protocol is obviously unlikely to be adopted by any of the EC Member States as it closely resembles the night work models condemned by the ECJ. It seems aimed at providing a transitional scheme of protection for ILO members, who realise it may take a considerable amount of time to introduce protection for the night worker, but who do not want to simply repeal the female night work ban.<sup>206</sup>

Convention No.171 introduced a sex-neutral legal subject in the area of night work for the first

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<sup>204</sup> *Europe, supra* at n.168.

<sup>205</sup> For example see Art.11(3) of the Convention on the Elimination of all forms of Discrimination against Women, adopted on 18 December 1979, where the UN Gen.Ass. requested that laws to protect women should be reviewed periodically in the light of scientific and technological knowledge and be 'revised, repealed or extended, as necessary'. See further ILO Resolution on Equal Opportunities for Men and Women (27 June 1985). This states that female-specific protective legislation should be reviewed at national level with a view to revising, extending, supplementing, extending, retaining or repealing such legislation according to national circumstances. Such measures must be aimed at improving quality of life and promoting equality of opportunity between men and women. In addition, it suggested that measures be taken to extend special protection to women and men from types of work proved to be harmful to them, especially from the standpoint of their social functions of reproduction.

<sup>206</sup> The 1990 Protocol came into force on 4 January 1995. Convention No.171 has been ratified by Cyprus, the Czech Republic, Lithuania and the Dominican Republic.

time at international level. The articulation of this text with both the issues raised by female night work and those raised by night work in general can be usefully contrasted with the EC Working Time Directive. The preamble of the Convention refers to the night work conventions on women and young people, to the Maternity Protection Convention and Recommendation 1952 and to the Discrimination (Employment and Protection) Convention 1958. Article 3 of the Convention states that

specific measures required by the nature of night work, which shall include, as a minimum, those referred to in Articles 4-10,<sup>30</sup> shall be taken for night workers in order to protect their health, assist them to meet their family and social responsibilities, provide opportunities for occupational advancement, and compensate them appropriately. Such measures shall also be taken in the fields of safety and maternity protection for all workers performing night work.

The Recommendation expands on the specific content these terms should take. Thus, compensation for night work should be additional to day time remuneration, should respect the principle of equal pay for equal work or for work of equal value for men and women, and may be converted to reduced working time only by agreement. Under the heading of social services, a number of issues central to our discussion are detailed. The issue of transport is comprehensively covered. The rationale for transport measures is to 'limit or reduce the time spent by night workers in travelling between their residence and the workplace, to avoid or reduce additional travelling expenses for them and to improve their safety when travelling at night'. On the issue of workers with family responsibilities, two measures are of particular importance. The first states that the extent to which night work is performed locally should be one of the factors considered when deciding on the establishment of crèches or other services for the care of young children, choosing their location or determining their opening hours. The second states that in cases of shift work, the special situation of workers with family responsibilities, of workers undergoing training and of older workers should be taken into consideration when decisions are taken on the composition of night crews.

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<sup>30</sup> These cover free health assessments; first-aid facilities; transfer of night workers to day work; protection for pregnant workers and workers who have just given birth; the recognition of the nature of night work in determining compensation, working time or other benefits; the provision of appropriate social services for night workers and the consultation of workers' representatives on the introduction (and thereafter at regular intervals) of work schedules requiring night workers on the forms of organisation best adapted to the establishment, its personnel and on the occupational health measures and social services required.

These texts are not perfect. For example, the provisions on transfers for health reasons could usefully have been extended to workers with family responsibilities and the 'good' provisions are largely to be found in the Recommendation. Nevertheless, these texts represent a real attempt to tackle the gaps left by repeal of female night work regulation. Furthermore, unlike the other female night work regimes examined in this chapter, they explicitly target the problems raised by night work which were used to argue for its maintenance before the ECJ in *Stoeckel*.

However, thus far, of the EC Member States, only Portugal has decided to ratify the Convention and, even so, the instrument of ratification is awaited. Otherwise only Greece, Italy and Belgium have shown any interest in ratification.<sup>208</sup>

## 5.5 The Member States

Before examining the current situation in Member States, I would like to return to a point referred to in passing earlier.<sup>209</sup> This is the argument that a number of 'protective legislation' families exist and that countries which are more 'advanced' in equality have either never accepted the existence of female-specific protective legislation (outside pregnancy and maternity) or quickly got rid of it on the introduction of equal treatment legislation. Thus in the US, where the most significant form of female-specific hours protection was maximum-hours laws, these were struck down by the courts in a series of class actions between 1967-73.<sup>210</sup> In Scandinavia, the idea of female-specific night work protection was rejected in the first quarter of this century in Denmark and Norway. In Sweden and Finland, such legislation was introduced but, within a relatively short space of time, repealed.<sup>211</sup> Similarly, within the EC, the UK and the Netherlands finished the argument on female night work before it had got off the ground in other Member States. While it is important and interesting to examine when equal treatment norms or arguments engaged with

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<sup>208</sup> I am grateful to the ILO for providing this information which dates from July 1995.

<sup>209</sup> *Supra* at Section 1.

<sup>210</sup> See Ratner, 'The paradox of protection: maximum hours legislation in the US', 119 *International Labour Review* (1980) 185.

<sup>211</sup> Nielsen, 'Special protective legislation for women in the Nordic countries', 119 *International Labour Review* (1980) 39.



the issue of different types of female-specific protection, it is equally important - though rarely done - to classify countries on the basis of the outcome of a decision that equal treatment norms and female-specific legal formulations do not, or can no longer, mix. Looked at from this perspective, the UK, the Netherlands<sup>212</sup> and the US do not seem to belong to the same family as the Scandinavian countries with their Work Environment Acts and extensive crèche facilities. Taking the outcome of a decision that female night work regulation is incompatible with an equal treatment guarantee as our starting-point, what has happened following the recent EC-wide dictum on the incompatibility of female night work regulation with equal treatment norms?

As we have seen, the issue of female night work has not been resolved in France<sup>213</sup> and, in the UK, has been resolved in a way that involves taking away a badly-targeted protection and putting nothing in its place.<sup>214</sup> The problems raised by *Stoeckel* and its application in national courts have not proved susceptible to a quick (ETD-conforming) fix in Italy or Belgium either. In Italy, the lower house of the Parliament amended a proposal to remove female-specific night work legislation in the 'legge comunitaria' to a text allowing female night work following a collective agreement.<sup>215</sup> In Belgium, the social partners, have - since 1992 - struggled over the issue of the conditions under which night work could be extended to women. In 1994, National Agreement No.46 on night work was amended. Female night work can still only be introduced if a sectoral joint committee makes a unanimous recommendation to the Ministry of Labour. However, it was agreed that, prior to making such a recommendation, the joint committee must negotiate on ways of facilitating women's access to night work. This was accompanied by a recommendation to the joint committees from the National Labour Council, inviting them to re-examine the problem of women's access to night work from two perspectives - the promotion of women's employment and of equal opportunities. In December 1996, a bill was approved by Parliament which

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<sup>212</sup> See Wentholt, 'Equality and Gender: the (In)compatibility of the Legal and the Feminist Debate', in Y.Kravaritou (ed.) *The Sex of Labour Law in Europe* (Kluwer Law International: The Hague, 1996).

<sup>213</sup> See *supra* n.170 and text accompanying n.188-190.

<sup>214</sup> *Supra* Section 3.1.2.

<sup>215</sup> An amendment to modify Art.5 of the 1977 law was withdrawn by the government on 4 April 1995. See Sciarra (1995) *supra* at n.150. See also the situation in Switzerland, where the Government has tried repeatedly and unsuccessfully, to remove national female night work legislation following its denunciation of ILO Convention No.89 in 1992. For the failure of these attempts see 236 *EIRR* (1993) 14 and 256 *EIRR* (1995) 12-13. On 1 December 1996, the Swiss rejected amendments to female night work legislation in a referendum, 276 *EIRR* (1997) 13.

introduces gender neutral night work regulation. Night work, for both men and women, will be automatically allowed in industries where night work is necessary, where production is necessarily and where the production of perishable goods is concerned. To introduce night work in any other enterprise, the employer must first consult with employee representatives about the changes night work would entail in terms of working conditions and secondly, conclude an agreement with all trade unions present in the enterprise. Employees who have not previously worked at night will have a three month trial period during which time they have the right to return to their previous working hours. Employees who exercise this right are protected against dismissal. Moreover, under a 1990 Regulation which will now apply to female night workers, employees working at night are entitled to have their full travel costs met by the employer.<sup>216</sup>

In Germany, a new Working Time Law came into force on June 10 1994.<sup>217</sup> This permits night work for both men and women but subjects this to stricter health and safety precautions than those found in the EC Directive. Certain of these requirements can be redefined, within parameters set out in the law, by collective agreement.<sup>218</sup> For our purposes, s.6(4) of the new law is of great interest, as it is the first clause in a EC Member State legislative text post-*Stoeckel* which attempts to provide any articulation with the objectives discussed above.<sup>219</sup> This section requires employers to transfer night workers at their request to suitable daytime posts if a doctor determines that continued performance of night work will be harmful to their health or if there is a child under twelve years of age living in the worker's household who cannot be cared for by another household member, or the worker must look after a relative who needs constant nursing care and cannot be looked after by another relative in the household. The only reasons an employer may give for refusing such a request are urgent reasons within the enterprise. If such reasons prevent the transfer of the worker to a suitable daytime workplace, the works council or the personnel committee must be consulted and they can both offer the employer suggestions for

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<sup>216</sup> See, for the 1994 changes, 253 *EIRR* (1995) 5. For the 1996 legislation, due to come into force in early 1998, and the 1990 Regulation see 279 *EIRR* (1997) 24-25.

<sup>217</sup> For the text of this law in English see *Labour Law Documents* (1994) at 34-43.

<sup>218</sup> For example, 'night time' is defined as the period between 11pm and 6am (s.2(3)) but s.7(1)(v) provides that a collective agreement or individual works agreement may provide 'that the beginning of the seven hour period under subsection 2(3) be provided for in the time between 10pm and midnight.'

<sup>219</sup> *Supra* at Section 5.4.

a transfer.

While the German law is an important recognition inside labour law that workers have family responsibilities, it also clearly demonstrates what leaps of the imagination will be necessary to provide a regulation of night work which makes the night fit for men and women to work in. These imaginative leaps can spring from an articulated reflection between the requirements of sex equality and the requirements of employment protection and regulation (that is, what *forms* of intervention will best protect the night worker). The penultimate section of this chapter will analyse doctrinal treatment of female night work regulation in the UK, France and Italy in order to examine the likelihood, given the categorisation of female-specific night work regulation by doctrine, of such an articulated protection being conceived and given safe anchorage within the conceptual apparatus of equality and/or employment regulation.

## **6. Formal and substantive equality and female night work regulation**

### **6.1 From noise to silence: doctrinal interest in the relationship of female night work with equal treatment**

Taking the *Stoeckel* judgment as a convenient starting point, it is clear that the silence in the UK stands in stark contrast to the extensive reporting, analysis and critique of *Stoeckel* in France and Italy. Italy is included here, not merely for the considerable intrinsic interest of Italian writings on this subject, but because it provides an extremely useful counterfoil to the construction of the relationships between equality, employment regulation and female night work in France and the UK.

This contrast becomes even starker and further differentiations can be drawn between the three countries if we compare the general interest in supranational and national equality developments on the one hand, with interest in *Stoeckel*'s conceptualisation of equal treatment and female night work on the other. In the UK, there is a high level of multi-faceted interest in equality developments at national and supranational level. Therefore, the sidelining of *Stoeckel* was an exceptional occurrence. It is one of the few ECJ judgments on equal treatment in employment

which was not reported in the Industrial Relations Law Reports.<sup>220</sup> It received only very belated and limited coverage in labour law or general law journals.<sup>221</sup> Recent attempts in the UK to conceptualise the panoply of ECJ activity in the field of sex equality conspicuously exclude the night work judgments from their analyses.<sup>222</sup>

In France, the treatment of female night work has also been exceptional but in a rather different way. As we have seen,<sup>223</sup> to date there has been a low level of interest in equality developments, at national or supranational level in France. Hence, the spate of articles on the relationship between female night work and equality stands out like a solitary skyscraper in the French doctrinal equality landscape. In Italy, there has been a recent and continuing upsurge of interest in sex equality. The issue of female night work and equality has been given some treatment on its own and has also been incorporated within broader debates on equality.

This may be argued to merely reflect the effects *Stoeckel* was likely to have on the national system. It was the first preliminary reference from France to the ECJ on sex equality. It concerned an ILO Convention. And it resulted in the non-application of a provision of national law by French courts. Unsurprisingly, this was controversial. In Italy, while the ILO arguments were bound to be less important - given the fact that the national legislation had departed from the terms of the Convention in 1977 - the *Stoeckel* judgment still had implications for the national system which had to be considered. In the UK, female night work regulation had already been conclusively dealt with in the SDA 1986. Therefore *Stoeckel* was of little or no interest.

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<sup>220</sup> The *Levy* judgment is reported [1994] IRLR 193 but largely for its interest in terms of the ILO/EC point rather than its implications in terms of sex equality. The *Minne* judgment is not reported.

<sup>221</sup> The first reference to *Stoeckel* is when it is included in a case note on *Levy* written by a Belgian contributor; see Wuaimc, 'Night work for Women - *Stoeckel* Revisited', 23 *ILJ* (1994) at 95-100. BUT SEE DOCKSEY.

<sup>222</sup> Fredman, 'European Community Discrimination Law: A Critique', 21 *ILJ* (1992) 119 does not mention *Stoeckel* in an otherwise wide ranging analysis. Similarly, More, 'Equal Treatment of the Sexes in EC Law: What does "equal" mean?', *Feminist Legal Studies* (1993) 45 makes no reference to *Stoeckel*. Where *Stoeckel* is seen as an important component of the ECJ's equality jurisprudence in the English literature, it is when an explicitly comparative approach is adopted to analyse the ECJ's equality jurisprudence; see Sohrab, 'Avoiding the 'Exquisite Trap': A Critical Look at the Equal Treatment/Special Treatment Debate in Law', *Feminist Legal Studies* (1993) 141; see also the inclusion of *Stoeckel* as part of a comparative study of UK and German equality law in T.K. Hervey, *Justifications for Sex Discrimination in Employment* (Butterworths: London, 1993) at 64 and 154.

<sup>223</sup> See generally Chapters 2, 3 and 4.

I consider this explanation to be correct but insufficient. It merely begs a further series of questions. If the important point is that the ECJ was addressing itself to the French situation, this does not explain why, in France, the two Article 169 actions taken against it in the 1980s attracted considerably less attention.<sup>224</sup> In the UK context, it fails to explain why judgments such as *Hofmann* and *Commission v France*,<sup>225</sup> which are neither addressed to Britain nor, considered narrowly, are of much relevance in the British context, are considered essential in attempts to draw the contours of the ECJ equality approach.

Secondly, it could be argued, particularly in reference to the low key response in the UK, that the *Stoeckel* judgment itself provided precious little material for the reopening of a debate on the regulation of female night work in a jurisdiction where the statutory position at the time of the judgment accorded with the position adopted by the ECJ. However, while this may be true, it is as useful to us as a lamppost is to a blind person; while it may provide support, it sheds no light on the issue. Explaining the uncontroversiality of *Stoeckel* in the UK by saying that the SDA 1986 had already terminated discussion does not explain why repeal received so little attention and why the endorsement of that approach at European level was seen as equally unexciting.

A third argument which could be marshalled to explain the different reactions to *Stoeckel* in France and the UK is the 'foregone conclusion' argument. This argues that it is precisely the greater general degree of interest in EC level equality developments in the UK which made *Stoeckel* so unworthy of detailed analysis. Thus, the clear outlawing in *Johnston*<sup>226</sup> of measures distinguishing between men and women which did not fall under Article 2(3) (or Article 2(2)) of the ETD made the *Stoeckel* decision easy to predict. While, as discussed above,<sup>227</sup> there is undoubtedly some truth to this statement so far as the ECJ's equality formulation is concerned, this argument is of dubious persuasive value for at least three reasons. First, even accepting that

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<sup>224</sup> Case 318/86 *Commission v. France (Re Sex Discrimination in the Civil Service)* [1988] ECR 3559 and Case 312/86 *supra* at n.41. The former is discussed in Chapter 1, 3 and 4; the latter is discussed in Chapters 3, 4 and 5.

<sup>225</sup> *Supra* at n.139 and n.41 respectively. See, for example, the extensive discussion in More (1993) *supra* at n.222.

<sup>226</sup> *Supra* at n.139.

<sup>227</sup> *Supra* at Section 4.4.4.

the equality conclusion was clearly predictable, this still left the argument on the ILO norm which was by no means a foregone conclusion. Second, the clear predictability of a ECJ decision in the field of equal treatment or other areas of EC law has rarely impeded its extensive discussion and dissemination in the UK. The Court's decisions in *Webb*<sup>228</sup> and *Factortame*<sup>229</sup> were at least as predictable as the decision in *Stoeckel*, yet both received extensive coverage. Finally, examination of French doctrinal coverage on night work quickly dispels the impression that they are ignorant of the *Johnston* strand of the Court's jurisprudence; they simply either agree or disagree with it.

Fourthly, it could be argued that doctrinal reaction merely reflects the reactions of other actors at national level. As we have seen, none of the main institutional actors in the UK mobilised strongly against straightforward repeal,<sup>230</sup> whereas in France, there was a high level of mobilisation by the unions against any attempt to re-regulate female industrial night work.<sup>231</sup> Hence, this argument would say that the silence in Britain, the (relative) explosion in French doctrine and the incorporation into a larger debate in Italy directly follows from the differing reactions of other actors at national level. This is correct to the extent that it may, on occasion, indicate whether doctrinal engagement is likely to take place, but not to the extent of determining what that engagement will be. To assume that it determines the latter as well as the former would be misleading in several ways. It assumes a unity of opposition in France to the EC stance which does not exist. Thus, firstly it wrongly assumes that all the French unions shared the same views on female night work.<sup>232</sup> Secondly, it assumes that French doctrinal comments unanimously supported these views which, as we shall see shortly,<sup>233</sup> is clearly not the case. More generally, this type of argument implicitly assumes that doctrine follows the lead of initiatives taken by

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<sup>228</sup> Case C-32/93 *Webb v. EMO (Air Cargo) Ltd* [1994] ECR I-3567 and see Chapter 5 at n.78.

<sup>229</sup> [1990] ECR I-2433 and see Rubenstein's comments on the predictability of *Webb* (ECJ) in IRLR [1994] at 313-314. On the inevitability of *Factortame No.2* from an ECJ perspective see Lord Slynn, 'Sanctions in Community Law: An Overview' in M. Verwilghen (ed.) *Access to Equality Between Men and Women in the EC* (Presses Universitaires de Louvain: Louvain la Neuve, 1993) 122 at 127.

<sup>230</sup> *Supra* Section 3.1.2.2.

<sup>231</sup> *Supra* Section 5.3.

<sup>232</sup> *ibid.*

<sup>233</sup> *Infra* Section 6.3.

others. This assumption is challenged by examining indirect discrimination in France where it is arguable that doctrine is attempting to introduce and make familiar the concept of indirect discrimination.<sup>234</sup> Furthermore, this argument conceals important differences as to the extent to which the agenda of the debate may be set by other institutional actors. Thus, while the French unions are often very much involved in influencing French night work doctrine, in Italy, the debate has been carried out in a way which does not necessitate any consideration of individual unions' position in relation to the night work ban.

If these explanations are seen as inadequate, can a more convincing explanation of the different extent and content of doctrinal comment on female night work regulation be found? A tentative, alternative response is that these doctrinal differences are dependent on first, the degree of development of sex equality laws, in terms of both utilisation and conceptualisation and secondly, the construction and conceptualisation of labour law. These two factors will determine how formal and substantive equality are formulated and applied in a given situation, in this case the relationship of female night work with a norm of equal treatment on grounds of sex. Qualitative judgments determine the quantitative level of interest in the relationship between equal treatment and female night work. These qualitative judgments are - or can be - expressed in terms of formal and substantive equality. Formal and substantive equality are used differently in these jurisdictions, although these different conceptualisations may coincide in the context of a particular issue to categorise similarly (that is, as formal or as substantive equality) a certain discrimination technique or application of that technique. One important difference in their utilisation in the female night work debate is the degree to which the conceptual apparatus of sex equality is articulated with the conceptual apparatus of labour law. To schematise, I wish to argue that sex equality in the UK has a very highly developed, but non-articulated, conceptual sex equality apparatus. This may be connected to the fact that British labour law doctrine has not used the organising concepts of formal and substantive equality to any significant extent. France has a non (or under)-developed sex equality conceptual apparatus but the conceptual apparatus of labour law, formulated around the poles of formal and substantive equality, is employed in the night work debate. Italy has a highly developed sex equality conceptual apparatus which articulates with a labour law apparatus which is organised around the concepts of formal and substantive equality.

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<sup>234</sup> See Chapter 3 at n.289.

It is these factors which I feel provide the best explanations for the different trajectories of the female night work debate in these three jurisdictions. Nevertheless, some of the other possible explanations considered above, may provide supplemental - but not complete - explanations in certain instances.

## **6.2 Silence and straightforward approbation: UK doctrinal comment on repeal of female-specific regulation**

The most striking illustration of the unimportance of the female nightwork issue is the small amount of coverage it receives in the considerable body of literature on equal treatment in the UK. In two monographs which specifically examine equal treatment of the sexes in employment,<sup>235</sup> neither the existence of female night work regulation and its repeal in 1986 nor the further set of repeals in the Employment Act 1989 are seen as worthy of even a passing mention. A reader from another European country, interested in comparing the controversy in their country with that in the UK, would close these books thinking that female night work regulation had never existed and would certainly be surprised to learn that its recent repeal had not merited any examination by UK writers on equal treatment.

The literature that does mention female night work regulation provides some hints as to why its exclusion in discussions of equal treatment is not seen as a glaring omission in the UK context. Pannick, writing before the repeal of female nightwork regulation, states in relation to the EOC report:

As [it] suggests, there are very few protective measures which should be confined specifically to women. In most cases the protective measures should either be abolished or made applicable to men and women. [...] It is very doubtful whether s.7(2)(f) [SDA 1975] is compatible with the Equal Treatment Directive. Article 2(3) of that Directive states that it is 'without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'. But 'protection' must be based upon physical distinctions between men and women, not on stereotyped assumptions about ability or attitudes (for eg women's ability or willingness to do night work).<sup>236</sup>

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<sup>235</sup> The two monographs are K. O'Donovan and E. Szyszczak, *Equality and Sex Discrimination Law* (Blackwell: Oxford, 1988) and S. Honeyball, *Sex, Employment and the Law* (Blackwell: Oxford, 1991).

<sup>236</sup> D. Pannick, *Sex Discrimination Law* (Clarendon Press: Oxford, 1985) at 264-6.



Similarly, Ellis, writing between the SDA 1986 and the Employment Act 1989, quotes the EOC findings and adds:

In the view of the present writer the repeal of the protective legislation is to be welcomed. Not only was the legislation paternalistic in its origins, but it reinforced gender stereotyping without remedying any generalised disadvantages from which women today could be said to suffer.<sup>237</sup>

Furthermore, she states in relation to the pre-1989 position in relation to women working underground in mines:

Less easily justified is the existing exception in relation to miners. It is now provided that they may not be employed in a job the duties of which normally require the employee to spend a significant proportion of time below ground in an active mine, although there is no physical reason why such a job should be more harmful to women than to men.<sup>238</sup>

She goes on to discuss the EC position and the strong possibility that the UK is in breach of its Community obligations.<sup>239</sup>

Townshend-Smith also concentrates on the incompatibility of protective legislation with EC obligations although he does present another possibly valid argument that the consequences of equalisation may 'give [women] no real choice but to accept whatever changes in hours employers seek to impose, particularly as so many secondary sector women workers lack the protection of union representation'.<sup>240</sup> Only Gregory and Coyle argue solely against repeal.<sup>241</sup> Significantly, Deakin, in a comment on the 1989 Employment Act, by adopting a comparative perspective on the regulation of working hours in general, concludes that 'the removal of archaic and complex regulations only makes more compelling the case for a comprehensive floor of rights in

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<sup>237</sup> E. Ellis, *Sex Discrimination Law* (Gower: Aldershot, 1988) at 120.

<sup>238</sup> *Ibid* at 121.

<sup>239</sup> *Ibid* at 206.

<sup>240</sup> R. Townshend-Smith, *Sex Discrimination in Employment: Law, Practice and Policy* (Sweet and Maxwell: London, 1989) at 130.

<sup>241</sup> J. Gregory, *Sex, Race and the Law* (Sage: London, 1987) at 17ff; Coyle *supra* at n.61.

employment legislation'.<sup>242</sup>

### 6.2.1 Explaining the silence: formal and substantive equality in the UK night work debate

At the beginning of this section, I argued that the UK's silence, on the female night work debate, can be explained by the fact that, in the UK, a highly developed sex equality apparatus is relatively divorced from labour law's conceptual apparatus. The terms 'formal' and 'substantive' equality in the British context are closely and almost exclusively linked to sex equality norms which constitute a 'free-standing' phenomenon within British labour law with their own rules, vocabulary, sources, specialists and techniques. Sex equality has carved out its own kingdom within British labour law.

The reasons for the high degree of autonomy of sex equality's conceptual apparatus from that of labour law can be seen in two broad tendencies. The first is the relative lack of systematic definition of labour law as a discipline in the UK in terms of formal and substantive equality.<sup>243</sup> This will become very clearly apparent when we examine how the terms formal and substantive equality are used in France and Italy and compare this with how they are employed in the UK.<sup>244</sup>

The second broad tendency is the very high degree of affinity of UK equal treatment doctrine with EC equal treatment doctrine. This has arguably strengthened the free-standing nature of the UK sex equality conceptual apparatus in British labour law. There is a strong argument that equal treatment at supranational level is unarticulated, not only with labour law defined in terms of formal and substantive equality, but with labour law *per se*.<sup>245</sup> In the Community legal order, sex equality norms have preceded other social norms and have occupied a much more central position

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<sup>242</sup> Deakin *supra* at n.68.

<sup>243</sup> Though see, in the context of international labour standards, Bob Hepple's argument that we need to move from a focus on vertical equality to 'concentrate on horizontal equality between different groups which make up the workforce'; 'Equality: A New Global Standard' in W. Sengenberger and D. Campbell (eds.) *International Labour Standards and Economic Interdependence* (Institute for Labour Studies: Geneva, 1994) 123.

<sup>244</sup> *Infra* Sections 6.3. and 6.4.

<sup>245</sup> Davies, 'The Emergence of European Labour Law', in W. McCarthy (ed.) *Legal Interventions in Industrial Relations: Gains and Losses* (Blackwell: Oxford, 1992) 313 at 345.

in the Court's jurisprudence than other employment provisions.

This is intrinsically linked to the fact that the Community legal order is only now beginning to possess anything like a coherent framework of employment law. It still lacks many of the features considered essential in most democracies and in international labour law to constitute a coherent regime of employment protection and regulation.<sup>246</sup>

These two tendencies mean that questions as to possible relationships between a particular employment norm and an equal treatment rule tend to be considered *solely* in terms of their conformity with the equal treatment rule. This connects to the definition given to formal and substantive equality. Formal equality can only be used in this conceptual set-up in a negative sense. It is used to signify disapproval of a particular application of an equal treatment rule, whilst substantive equality is used to indicate what would have happened if the court or legislature had not adopted that approach (although often without indicating whether the court or legislature should simply have retained the contested employment norm or formulated a new norm). Where, on the other hand, a particular application of an equal treatment rule is seen as *correct*, there is no need to employ the terms formal and substantive equality. Indeed, there is little need to say anything at all.

This obviously cannot suffice in itself to explain the silence surrounding the repeal of female night work provisions in the UK. It provides only one side of the coin. It demonstrates why the evaluation of sex equality norms and their application in the UK (and the EC) is disconnected from the conceptual apparatus of labour law. The other side of the coin requires considering what questions will be posed by the jurist in order to determine whether a particular decision (by a court or a legislature) constitutes a *correct* application of an equal treatment norm. I wish to argue that different sets of questions tended to be posed in France, Italy and the UK precisely because

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<sup>246</sup> The most notorious exclusion is that of the right to strike and lock-out in Art.2(6) of the Social Protocol to the Maastricht Treaty. For comments on this and more generally on the piecemeal development of EC social law see Sciarra, 'European Social Policy and Labour Law: Challenges and Perspectives' in *Collected Courses of the Academy of European Law*, Vol.IV.1 (Kluwer: The Hague, 1995) 301 and by the same author, 'Social Values and the Multiple Sources of European Social Law', *European Law Journal* (1995) 60. For some proposals on how to refashion European social law see R. Blanpain, B. Hepple, S. Sciarra, *Fundamental Social Rights: proposals for the EU* (Peeters: Leuven, 1996).

of the varying strengths of sex equality's conceptual apparatus and their respective degrees of articulation with the conceptual apparatus of labour law.

Thus, the relative uncontroversiality of the outright repeal of female night work in the UK and the lack of attention given to the issue by commentators indicates that female night work is seen as clearly incompatible with an equal treatment rule. Therefore, the decision that female night work provisions and equal treatment are incompatible is seen as the *correct* application of an equal treatment rule rather than as an instance of *formal* equality. Hence, the terminology of formal and substantive equality does not need to be employed and the decision requires little discussion. But why is the decision seen as correct?

It would seem as if this is because the commentators see that there is a difference of treatment between men and women which is not justified by a relevant physical reason. Relevant physical reasons concern pregnancy and maternity. Given the structuring of the commentators' inquiry, the female night work norm is clearly contrary to the equal treatment norm. What makes the conclusion either repeal<sup>247</sup> or indifference as to whether or not repeal or extension is the outcome of the incompatibility of the norm with equal treatment<sup>248</sup> is the failure to examine 'treatment' in the ways in which it is examined in the French and Italian debates.

How does this failure to examine 'treatment' operate and what are its consequences? To argue for repeal means arguing that the 'treatment' was a disadvantage for women rather than an advantage for women and/or a disadvantage for men. Ellis gives two reasons for treating female night work regulation as a disadvantage for women. First, it reinforces gender stereotyping and secondly, it contributes to the unfavourable treatment of women in industry as employers can rely on it to argue that women make less flexible employees than men. However, the first reason merely restates the fact that there is a difference in treatment. As for the second reason, the argument that the regulation of female night work makes female employees less flexible than men, while it may be correct, completely fails to recognise that labour protection rules may legitimately aim to make employees less flexible for employers. This argument once again concentrates on the

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<sup>247</sup> Ellis *supra* at n.237.

<sup>248</sup> Townshend-Smith *supra* at n.240, Pannick *supra* at n.236.

‘difference’ rather than the ‘treatment’. Turning to those who argue that the current norm must go, but are indifferent as to the manner of its going, this stance entails complete and deliberate disinterest in what the treatment is. Under this approach, we could substitute for the word ‘treatment’ either ‘regulation of night work’ or ‘regulation of bicycle colours’ and the analysis of Pannick *et al.* would not alter one jot. In neither case is the treatment taken seriously or defined outside the confines of the equality norm. This approach is bolstered by being in conformity with that adopted by the ECJ, which also tends to consider treatment in the abstract where a employment norm differentiates treatment on grounds of sex.

Taking this argument from the ‘other end’, so to speak, we could argue that this is a legitimate stance for those commencing from a ‘sex equality’ perspective to take and that it was up to those adopting a ‘labour law’ perspective to argue that the ‘treatment’ being considered here was of primary importance and that straightforward repeal entailed the unacceptable jettisoning of one of the few pieces of working-time regulation the UK possessed. The fact that these ‘labour law’ arguments were not made may reflect (at least) two factors. The first is that the issue was seen as belonging clearly to the ‘sex equality’ sphere and therefore outside the immediate interests of labour law. The second is that it may be difficult to argue for the retention of a piece of legislation governing the working hours of a particular group of workers when there are no other legislative standards governing working time. Hence, there was little material upon which to construct an argument for new types of working-time legislation. Finally, while in ‘sex equality’ terms, there seems to be a clear and negative response towards this piece of legislation, when it is placed inside the conceptual apparatus of equal treatment, the labour law argument, not having the terminology of equality at its disposal, looks fuzzier and in danger of being construed as ‘anti-equality’. Hence, in the British debate, the arguments on the ‘correct’ answer in terms of formal and substantive equality begin and end with considering that there is a difference of treatment, which is not justified by a relevant physical reason. This form of reasoning ignores the issue of the ‘treatment’ being considered.

This is not necessarily meant as a criticism but rather as an attempt to understand the doctrinal response to female nightwork regulation and repeal in the UK. The difficulty of constructing an argument in the UK which is articulated with labour law’s conceptual apparatus can rapidly be

appreciated in the context of female night work regulation. As Loenen notes in her comparison of pregnancy in The Netherlands and the US,

the content of equality (or rather, the content of the *treatment* which should be equal) will depend on the overall values, principles and aspirations prevalent in a given society. We cannot escape our historic boundaries and think beyond them. In that sense equality will always be contextually defined and thus contingent.<sup>249</sup>

It is arguably difficult to construct a realistic argument in the UK that the legal regulation of night work is a benefit which should, in the application of an equal treatment norm, not be taken away from those women it currently benefits, but rather applied, albeit in a different form, to all men and women. Apart from women, the only workers (save very specific occupational categories such as long distance lorry drivers) whose working hours are regulated by statute are children. To argue that the only 'correct' equality response would be to regulate in a similar way the night work of all employees could be (and was) construed as either a backhanded argument for maintaining the current sex-specific regulatory framework or as a well-intentioned but utopian argument, of no concrete assistance in resolving the conflict between the sex-differentiated employment norm and an equal treatment rule.<sup>250</sup> The absence of a broad framework of legislative norms governing working time constitutes one part of the explanation. It would be tempting to argue that this, in turn, is emblematic of a broader historical absence in the UK of *legislative* norms governing many aspects of the employment relationship which contrasts with other countries which have viewed law as an uncontroversial means of setting up a range of models of employment protection. Hence, the less the state is expected to deliver substantive employment rights, the less likely are arguments demanding state intervention in a particular area.

While I believe that there may be some merit in this argument (and the debate on the extent to which and in what manner labour relations in Britain are juridified is far from over)<sup>251</sup> the point

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<sup>249</sup> Loenen, 'Comparative Legal Feminist Scholarship and the importance of a contextual approach to concepts and approaches: the case of the equality debate', *Feminist Legal Studies* (1995) 71 at 85.

<sup>250</sup> In this context, an extremely diluted version of 'utopia' may be realised when the Working Time Directive *supra* at Section 5.4.1. is implemented in the UK.

<sup>251</sup> On this debate see Simitis, 'Juridification of Labor Relations' and Clark and Wedderburn, 'Juridification - A Universal Trend? The British Experience in Labour Law', both in G. Teubner (ed.) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyter:

I want to underline here is a slightly different one. Whatever the reasons may be, and some form of argument based on the historically specific development of labour law in the UK may well provide part of the explanation, British labour law has not been conceptually constructed in a systematic manner by doctrine around the concepts of formal and substantive equality. Where this arguably does connect with the juridification thesis is that it has perhaps made this thesis easier to integrate into analyses of labour law as a discipline which are constructed utilising this conceptual apparatus. Where it most definitely connects with the argument on female night work and the application of a rule predicating equal treatment on grounds of sex to employment norms is that the absence of a common conceptual apparatus with the same terminology has made it difficult to articulate 'labour law' responses with 'sex equality' responses where no clear and immediate coincidence of interests occurs. Even where such a coincidence does occur, it tends to be sex equality which provides the conceptual apparatus and the weapons of battle to fight the erosion of employment rights, rather than vice versa.<sup>252</sup>

A second way of reaching the conclusion that night work should be adequately regulated for both men and women can flow from an expanded critical approach to sex equality norms themselves. This argument involves critiquing and challenging current understanding of the equal treatment standard itself. The argument is that, instead of reading this as 'equal treatment in employment', a more adequate standard against which employment (and other) norms can be measured is, for example, that of 'equal rights for men and women to work and have a family/care for others'. Read against this standard, a number of Dutch legal feminists have argued that the repeal of the prohibition of night work in The Netherlands violates equality. Thus Holtmaat argues:

A repeal of the prohibition of night work under the guise of equal treatment misses the point of the essential needs of women (and men) who both work for payment and take care of others. And in no way does it stimulate a (government or industrial) policy aimed at making the world a safer place for women.<sup>253</sup>

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Berlin, 1987) at 113 and 163 respectively.

<sup>252</sup> See, for example, the use of sex equality to challenge the abolition of Wages Councils discussed in Chapter 2 at n.71, to alter conditions of access (in terms of hours thresholds and length of service requirements) to a number of core employment rights such as unfair dismissal discussed in Chapter 3 at Section 2.3.5.4 and to attempt to obtain human rights in employment for homosexuals and transsexuals discussed in Chapter 3 at Section 2.3.3.1.

<sup>253</sup> Holtmaat, 'The Power of Legal Concepts: The Development of a Feminist Theory of Law', *International Journal of the Sociology of Law* (1989) 481 at 488.

Hence, Holtmaat argues for a rejection of thinking solely in terms of equal treatment since 'the concept of legal equality and that of equal rights cannot serve as a leading substantive principle and/or strategic concept for the role which law could play in breaking open power relations between men and women'. She wishes to develop 'other law' which will concentrate principally on 'changing the substance of legal principles and rules'. This argument is reformulated by Wentholt in terms of a questioning of current interpretations of the equality standard:

The drawbacks to irregular working hours apply to everyone, but lay an extra burden on workers with family responsibilities. The conclusion that workers with family responsibilities (mostly female) and workers without family responsibilities (mostly male) does not mean that special treatment for women is appropriate. Rather it means that women often have family responsibilities which lead to the prejudicial treatment of women. What treatment should result from this observation? My conclusion is thus that the principle of equality requires that workers (male and female) with family responsibilities can claim special working hours because of their private circumstances.<sup>254</sup>

In the UK, feminist critiques of the 'male norm'<sup>255</sup> consecrated in supranational and national equal treatment formulations, and calls to adopt a substantive equality approach where the 'ideal is to eliminate the disadvantages faced by women'<sup>256</sup> fail to draw any connections between the issue of female night work and the operation of equal treatment rules. This shows how female night work in the UK lies in a twilight zone, with the substantive benefits it could be argued to offer unable to fit themselves into either the conceptual apparatus of labour law or sex equality and the difference in treatment it entails permitting its straightforward condemnation as a piece of outdated discriminatory legislation.

### **6.3 And ne'er the twain shall meet: sex equality, equality and labour law analysis in French doctrinal comment on female night work regulation**

As noted earlier,<sup>257</sup> the issue of the compatibility of female night work regulation with equality,

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<sup>254</sup> Wentholt *supra* at n.212.

<sup>255</sup> Fredman *supra* at n.222.

<sup>256</sup> More *supra* at n.222.

<sup>257</sup> *Supra* at Section 6.1.



both before and following the *Stoeckel* judgment, is the only sex equality issue which has generated a substantial amount of doctrinal comment and discussion in France. To situate and understand the progress of this debate, I feel that it is essential to understand that the authors concerned are not discussing the same conceptions of equality or the same legal principles or rules of equality as each other. Broadly speaking, the issue of female night work is considered in three distinct debates, which show little sign of recognizing each other's existence. While this guarantees a (relatively) large amount of doctrinal coverage, the lack of articulation between the debates means that valuable opportunities for fruitful cross-fertilization are lost.

The three distinct debates concern:

- equality (and non-discrimination) as general principles in the French legal system.
- formal and substantive equality as organising concepts in French labour law.
- equality of treatment on grounds of sex.

### 6.3.1 Equality (and non-discrimination) as general principles in the French legal system

This position is well represented in an article by Lochak.<sup>258</sup> She examines first, the general capacity (indeed, necessity) for the legislator to constantly draw distinctions and secondly, when these distinctions will be considered discriminatory (illegitimate distinctions),<sup>259</sup> that is, when they are regarded as falling under a legal provision which makes the relevant distinction illegitimate.

However, as she says, the legal provisions against which distinctions are measured to decide on their legitimacy, 'can be precise, or, on the other hand, be as vague as a general affirmation of a principle of equality'. In the French context, these can range from the Declaration of the Rights of Man 1789 or the preamble to the 1946 Constitution to a general principle of equality in the absence of a text such as that recognised by both the *Conseil Constitutionnel* and the *Conseil d'Etat*. Hence, when a legislative provision establishes a difference in treatment, the *Conseil*

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<sup>258</sup> Lochak, 'Réflexions sur la notion de discrimination', *Droit Social* (1987) 778.

<sup>259</sup> Hence, Lochak sees the terms 'positive discrimination' and 'reverse discrimination' as extremely badly chosen and giving rise to terminological and ideological confusion, rather than clarification. This is evidently because they are legally sanctioned and hence legitimate distinctions rather than discrimination.

*Constitutionnel* can examine firstly, whether this difference can legitimately be taken into account, secondly, whether, in the area covered by the provision, this difference justifies different rules and, thirdly, whether the provision in question is compatible with the aims of the law. The *Conseil d'Etat*'s principle of equality requires that all persons placed in the same situation will be subjected to the same regime and treated in the same manner without discrimination.<sup>260</sup> Thus, the *Conseil Constitutionnel* is concerned with whether the legal rule itself establishes arbitrary distinctions, while the *Conseil d'Etat* concerns itself with whether the legal rule is applied to all in a non-discriminatory manner. Where private individuals (such as employers) are concerned, there can be no discrimination without text; the general principle of equality<sup>261</sup> gives way to the liberty of individuals to treat differently those with whom they enter into contractual relations.<sup>262</sup> These texts cover a wide range of suspect grounds on which to draw a distinction: sex, family situation, beliefs, ethnicity, race, trade union activities, religious convictions and the exercise of the right to strike.

Where does female night work fit into this way of examining equality? Lochak states:

On trouve au demeurant dans les textes bien des dispositions absolvant par avance des comportements qui apparaîtraient normalement comme discriminatoires, et qui leur accordent cette sorte d'immunité...les dispositions du code du travail visant à protéger spécialement certaines catégories de travailleurs, notamment les femmes, ou encore édictant des priorités d'emploi en faveur des jeunes ou des handicapés, font perdre leur caractère discriminatoire à des pratiques qui consistent pourtant typiquement en exclusions ou octroi des privilèges. Les risques que comportent certains emplois

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<sup>260</sup> The *Conseil d'Etat*'s sex equality jurisprudence is discussed in Chapter 3 at text accompanying n.XXX ff.

<sup>261</sup> Hence, the association of equality with public law: Ray, 'L'égalité et la décision patronale', *Droit Social* (1990) 83 states, 'pour les publicistes, l'égalité est une seconde nature, sinon une religion: en droit international public, en droit constitutionnel comme en droit administratif, le principe d'égalité est omniprésent'.

<sup>262</sup> On the extent to which the employer's liberty to take decisions in the running of an enterprise can be limited by equality provisions in labour law see Ray *ibid*. It is worth noting the contrast between the areas considered worthy of consideration in discussing the issue of equality in the workplace in French doctrine with the largely separate treatment of race and sex equality issues in the UK literature. Hence, Ray's examples include discrimination on grounds of sex, the 'protected status' of employee representatives (Art.L.412-18 c.trav.), between full-time and part-time workers (Art.L.212-4-2 c.trav.) and the order of selection of those made redundant in a collective redundancy situation. Furthermore, these specific provisions are used to attempt to found broader principles of non-discrimination and/or equality. For example, can the equal pay (between men and women) provision be used to argue that pay individualisation practices breach the principle of equality or to argue that paying two men who perform the same jobs breaches the equal pay provision? See further for a discussion of whether case law has accepted a general principle of equal pay between employees Rongère, 'A la recherche de la discrimination introuvable: l'extension de l'exigence d'égalité entre salariés', *Droit Social* (1990) 99.

pour la santé des femmes, les difficultés spécifiques que rencontrent les femmes les jeunes ou les handicapés pour trouver un emploi - tel est le motif légitime des différences de traitement autorisées par la loi, indissociable là encore de la légitimité de l'objectif poursuivi: la protection de la santé des travailleurs, le reclassement des handicapés, la lutte contre le chômage des jeunes.<sup>263</sup>

What is worth noting here is that scrutiny of a legal provision differentiating between men and women in terms of performance of night work is unlikely in this equality formulation to examine either the difference or the treatment very carefully.<sup>264</sup> This is arguably due to the operation of the principle of equality as a general principle in the French legal system. The principle of legal equality - the same rights for all - inevitably cannot mean no distinctions in legal rules. What it does mean is that classifications in legal rules may be subjected to some degree of scrutiny to ensure some degree of fit between the classifications drawn up and the treatment allocated to the different groups classified by the rule. Of course, this also means that the equality principle will be employed to examine potentially all classifications made in legal rules. This tends to translate into a lower level of scrutiny of classifications which, in some cases, will be acceptable. Thus, while race will almost always be an unacceptable classification (except in relation to positive action programs), sex will always be an acceptable ground of classification in certain circumstances, such as pregnancy.

Hence, applying the *Conseil Constitutionnel*'s formula to female night work, Lochak implies that the court might set out the questions and its responses in the following way:

- (1) Can the difference legitimately be taken into account? If it is not on grounds of race and there is a conceptualisable difference between the two groups, such as men and women, it is highly likely that this first question will be positively answered.
- (2) In the areas covered by the provision, does this difference justify different rules? Lochak suggests that the court will accept as justification the greater health risks for women who work at night.
- (3) Is the provision compatible with the aim of the law? Lochak suggests that protection of workers' health will be accepted as the aim of the law and hence, female night work is compatible

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<sup>263</sup> Lochak *supra* at n.258 at 789.

<sup>264</sup> For a general examination of the application of the *Conseil Constitutionnel*'s equality formula to labour law provisions see Lyon-Caen, 'L'égalité et la loi en droit du travail', *Droit Social* (1990) 68.

with the law's aim.

It is not inevitable that these questions will give rise to the suggested responses. However, these responses are unsurprising in the absence of a detailed examination of whether the 'difference' justifies the 'treatment'. This, in turn, may connect to the greater difficulty of courts reviewing a broad range of classifications against a general principle of equality to develop specialisation in particular areas of law. The French *Conseil Constitutionnel*, for example, has never had a employment provision which uses sex as a classification referred to it. It can review laws only prior to their promulgation and has only examined one sex-based classification.<sup>265</sup>

### 6.3.2 Formal and substantive equality as organising principles in French labour law

Female night work has also been evaluated within the conceptual apparatus of labour law. Unlike the UK, French labour law's conceptual apparatus is firmly anchored in the terminology of equality. In this conceptual apparatus, the focus is clearly on the relationship between employer and employee. The contract of employment, the axiom of liberal individualism, consecrates legal, superficial or formal equality, between the employer and the employee. From this individualistic perspective, the contract of employment is seen as a contract between equals. Work is treated as a 'thing'. And the work relationship is conceived of as the obligations affecting that 'thing' and not as a hierarchical relationship between two persons, economically unequal because money sits at one end of the relationship and need at the other, and legally unequal because of the relationship of subordination contained within the contract of employment.<sup>266</sup> Labour law was born of a critique of this formal equality. Thus Ray states, 'le droit du travail..voulant lutter contre l'égalité formelle, il protège le salarié, et semble introduire une juste inégalité'.<sup>267</sup> The correction of formal equality operated by labour law utilises two main mechanisms: the institution of collective

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<sup>265</sup> Conseil Constitutionnel, decision of 18 December 1982. This decision invalidated a legislative provision which instituted 'quotas' in favour of women for municipal elections. Lochak, *supra* at n.258, states that in the strictly legal sense, sex equality was not the issue as the court invalidated the provision on the ground that classifications could not be drawn up to determine eligibility for election.

<sup>266</sup> A. Supiot, *Critique du droit du travail*, (PUF: Paris, 1994) at 133.

<sup>267</sup> Ray *supra* at n.261 at 83.

contractual relations and the institutions of laws protecting the individual employee.<sup>268</sup> The extent to which the history of French labour law can be understood and analysed with the conceptual framework of formal and substantive equality is most clearly expressed by Supiot:

il suffit de retenir que l'édification du droit du travail français peut se lire tout entière comme une tentative d'englobement du principe d'égalité concrète dans un cadre juridique dominé par le principe d'égalité formelle. En première analyse, l'égalité formelle conduit à régler le travail salarié sur l'idée de contrat. Mais à un niveau plus fin l'égalité concrète règle sur l'idée de statut - de statut du travailleur - la correction des inégalités entre le faible et le fort.<sup>269</sup>

It is within this context that female night work regulation and, in particular, the *Stoeckel* judgment has been examined.

Thus, labour legislation protecting the safety of the worker constitutes the irreducible core of a system of labour law. It was the first area where labour law developed, both in European countries and at the level of international labour protection. Even in systems marked by a tradition of legal abstentionism (such as the UK) or those where labour law has only tentatively developed (such as the EC) safety of the worker is a primary and central concern. Supiot argues that the scope of health and safety should not be seen as confined to the prevention or compensation of physical injury, but extends to all aspects of the biological existence of the worker and, in particular, to the chronobiology of the worker. In this context, he argues that labour law reimposed the rhythms of day and night and weekly rest which had previously been imposed by the lack of artificial light and the dictates of the church, and which had been swept away in the first era of industrialisation.<sup>270</sup> Therefore, health and safety legislation is a basic recognition of the fact that 'dans le relation du travail, le travailleur, à la différence de l'employeur, ne risque pas son

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<sup>268</sup> Lyon-Caen *supra* at n.264.

<sup>269</sup> Supiot, 'Principe d'égalité et limites du droit du travail (en marge de l'arrêt *Stoeckel*)', *Droit Social* (1992) 382 at 383. Note that Supiot (1994) *supra* at n.266 distinguishes the development of the conceptualisation of labour law in France as a discipline from its conceptualisation in Germany. He states that in Germany, labour law was conceptualised not by recourse to the notion of concrete equality, but by attempts to reintroduce the values of group and community, *Gemeinschaft* rather than *Gesellschaft*, into the contract of employment. He attributes the preference in France for a conceptual foundation for labour law based on equality to the systematic recourse to egalitarian ideology in France since the Enlightenment.

<sup>270</sup> Supiot (1994) *supra* at n.266 at 68-71.

patrimoine, il risque sa peau' and is a primary example of the weakness of the employee in the employment relationship which labour law as 'concrete' equality must address and redress.

Unsurprisingly, *Stoeckel* is condemned by those examining it within this perspective. Bonnechère states:

L'interdiction du travail de nuit fut d'abord une barrière minimale opposée à l'exploitation. Et cette vision abstraite de la femme aujourd'hui "libre" de travailler la nuit sans contraintes familiales et sociales spécifiques est peu susceptible de convaincre nombre de femmes ouvrières et employées subissant, à la fin du XXe siècle certes, une double voir triple journée! Faut-il rappeler qu'une loi protectrice (assortie de multiples dérogations) est faite d'abord pour les faibles?<sup>271</sup>

Within this perspective, which contrasts sharply with the British perspective on possible interpretations of the ETD, the adverb 'notamment' in Article 2(3) 'ouvre ici la porte à l'égalité concrète dans la mise en oeuvre de l'égalité formelle entre hommes et femmes. Cette porte est refermée par la Cour de Justice qui cantonne les dérogations possibles aux deux seules situations que cet article vise explicitement: la grossesse et la maternité.'<sup>272</sup>

Both Supiot and Bonnechère stress the Court's inability to accept that the idea that men and women are not *in fact* equally exposed to the risks of sexual attack and family responsibilities should lead to treating these different situations differently *in law*: the notion of concrete equality. Supiot accuses the ECJ's reasoning in this case of maintaining a radical separation between formal equality in employment and the concrete (or substantive) inequalities in life outside employment. He argues:

cette manière de raisonner va à rebours de toute l'histoire du droit du travail qui a consisté précisément à reconnaître la dimension personnelle de la prestation de travail, autrement dit, à ne pas traiter le salarié comme un simple opérateur sur le marché du travail, mais à voir en lui un homme concret, voire une femme.<sup>273</sup>

The positive contributions of these analyses are first, that they stress the failure of the Court to

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<sup>271</sup> Bonnechère *supra* at n.114 at 353.

<sup>272</sup> Supiot (1992) *supra* at n.269 at 385; see also Bonnechère *ibid* at 352.

<sup>273</sup> Supiot (1992) *supra* at n.269 at 385.

examine the 'treatment', in the case of night work, the problems night work can create for all workers and the particular risks it currently creates for women. Secondly, it is a useful antidote to the tendency in (particularly UK) analyses to see this type of provision straightforwardly as a 'disadvantage'. Thirdly, both Lyon-Caen and Supiot stress the necessary co-existence of formal and substantive equality. Thus Lyon-Caen states, 'la vraie égalité repose nécessairement sur la fausse'<sup>274</sup> while Supiot states:

ne retenir du principe d'égalité que l'une des deux faces, que ce soit l'égalité concrète ou l'égalité formelle, conduit au même résultat: la primauté du fait sur le droit. Car l'affirmation univoque de l'une ou l'autre transporte hors de limites de la rationalité juridique. C'est dire que la tension entre l'égalité formelle et l'égalité concrète qui n'a cessé d'animer le droit du travail ne peut être supprimée.<sup>275</sup>

However, there are problems with this analysis. One is that there is a certain slippage between formal equality, defined as the equality of the contracting parties in the formation of a contract of employment and formal equality, in the example of night work, as a rule instituting equal treatment for men and women in employment. While the former deals with vertical inequality in the employment relationship, the latter is arguably directed at horizontal inequalities (that is, between workers). The failure to clearly distinguish these can lead to difficulties in the definition of concrete equality.

Supiot provides an illuminating analysis of the second type of formal and concrete equality (that is, in horizontal inequality situations) in his attempt to trace the limits of legal rationality in labour law. He does this by saying that the legal subject must recognise, on the one hand, the human identity of each individual and, on the other, the specificity and respect for the identity of each individual. This translates into two tendencies in law. Formal equality rules privilege generality, abstraction, and the durability of the legal rule over a broad range of factual situations. Concrete equality rules, on the other hand, tend to privilege the adaptation of rules to the diversity and rapid change of social situations. Slipping too far along either of these slopes means sliding from a state of law into a state of fact. Not to take into account factual difference is to make law ineffective,

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<sup>274</sup> Lyon-Caen *supra* at n.264 at 69.

<sup>275</sup> Supiot (1992) *supra* at n.269 at 385.

while taking into account the slightest factual difference means ultimately that individuals cannot share the same legal status and leads to mass objectivisation.

While I find this analysis extremely useful, it surely also means that both formal and substantive equality are used as corrective techniques *within* labour law rather than, as in the first definition of labour law as a discipline, providing the *raison d'être* for substantive or corrective measures to counteract the formal equality instituted by the contract of employment. In other words, a 'formal' equal treatment between the sexes rule surely constitutes a 'concrete' measure within labour law as a discipline. It is arguable that, at times, both Bonnechère and Supiot merge these two categories of formal and substantive equality. Hence, the 'formal' equal treatment rule becomes identified with formal equality in labour law as a discipline, while female night work regulation is viewed as a 'concrete' measure in labour law as a discipline and, by analogy (or magic), is also a 'concrete' measure in relation to the 'formal' equal treatment rule.

While Supiot is right to criticise the ECJ for refusing to examine measures falling outside its definition of Art.2(3), the confusion of different 'versions' of formal and substantive equality can be seen when he goes on to say:

on voit où conduirait cette manière de raisonner si elle devait être généralisée à tout ce qui touche l'organisation et l'aménagement du temps du travail: la vie privée des salariés étant réputée 'préoccupation étrangère' au droit du travail toutes les dispositions qui visent à faciliter la vie des salariés chargés d'enfants seraient nécessairement jugées contraires au principe d'égalité formelle entre salariés <sup>276</sup>

This fails to recognise adequately that the rule being applied and examined is a 'formal' equal treatment rule and that the 'concrete' solutions to be considered must be 'concrete' solutions with respect to that rule. The flip side of this confusion between formal equality and a formal equal treatment between the sexes rule is that 'concrete' solutions connected to the equal treatment rule are not seriously sought out nor are the problems with the current 'concrete' solution

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<sup>276</sup> Supiot (1992) *supra* at n.269 at 385.



(maintenance of female-specific night work regulation) considered.<sup>277</sup>

### 6.3.3 Equality of treatment on grounds of sex

The final way in which night work (and other female-specific protective measures) have been examined in France is by measuring them up against an equal treatment between the sexes rule. Although in some ways the arguments are similar to UK discussions of this issue, there are some significant differences of emphasis which can be attributed to three factors. First, the marginalisation of sex equality in general in French practice and doctrine. Secondly, the strong opposition the sex equality argument faces from other doctrinal arguments and social actors in the specific context of female night work. Thirdly, the emphasis within sex equality writings on legal tools favouring *mixité* (desegregation) as the primary means of achieving *de facto* equality between the sexes.<sup>278</sup>

Within the *mixité* perspective, the night work provision is, as Rossi bluntly and clearly dubs it, 'une législation directement discriminatoire productive de non-mixité'.<sup>279</sup> In this perspective, in the sphere of female employment, two types of logic are in operation. The first is the logic of protection of the specificity of women workers which leads to *non-mixité* in employment. The second, of more recent origin, is an equality logic which aims to assimilate women as full workers. The second logic is inhibited from operating by the application of the first. Female night work regulation is evidently the antithesis of the aims and goals of equal treatment thus defined. In France, unlike in the UK, the legislation is seen as having direct effects on excluding women from the employment market, particularly in the context of technological change and enterprise restructuring. Furthermore, the legislation is seen as having been used by employers as an alibi for

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<sup>277</sup> Supiot *ibid.* states that the decision would have been acceptable if the Court had stated that the protection risked maintaining the inequalities which exist inside the family. It is hard to see why this alone should absolve the Court or why this should be seen as situating 'son raisonnement à l'articulation du principe d'égalité et des conditions concrètes d'existence des femmes'. Bonnechère *supra* at n.114 simply states, 'Imagine-t-on vraiment que l'abolition du travail de nuit des femmes va transformer cette situation? Le risque n'est-il pas au contraire d'aboutir à une surexploitation de la main d'oeuvre féminine, plus vulnérables, en général à toutes les formes 'particulières' d'emplois?'

<sup>278</sup> See Chapter 4 at Section 4.1.

<sup>279</sup> Rossi, 'Emploi des femmes et mixité: droits et pratiques', *Droit Social* (1987) 155.

hiring or promoting fewer women than men. Thus Junter-Loiseau states, 'les exemples dans lesquels la modification de l'organisation du travail se traduit par l'exclusion des femmes abondent, et attestent que l'effet d'exclusion est loin d'être négligeable'.<sup>280</sup>

Second, given the failure to integrate EC sex equality developments into the French national order in most other areas,<sup>281</sup> particular attention is paid to pointing out that there is nothing surprising about this decision and that it is the natural progression in a path laid out by previous Community initiatives and ECJ jurisprudence in this area.<sup>282</sup> Therefore, it is France which is seen as lagging behind in its failure to put its sex equality house in order. The understandable frustration of those interested in using sex equality laws at both national and European level to improve French women's position on the labour market with the French legislature and unions - who seem to have a very selective interest in sex equality developments - is also clearly evident. Thus Junter-Loiseau directs her critique both at the French legislature, 'On ne peut vouloir Europe social et chaque fois qu'elle se présente "in concreto" lui tourner le dos!' and at the unions, 'les pourfendeurs du travail de nuit devraient figurer parmi les rangs des ardents promoteurs de l'égalité professionnelle. Toutefois, l'évaluation des quelques plans conclus depuis 1983 tend à établir qu'ils n'ont guère investi le sujet!'<sup>283</sup> Therefore, those writing in this perspective take considerable pains to show the negative effects this legislation has had, both symbolically and in fact on women in employment, how this legislation is clearly contrary to an equal treatment rule, and how it is inadequate to take an interest in the concrete disadvantages women face in employment on this, and only this, issue.

The solution advocated tends to be repeal. However, once again, in sharp contrast to the equal

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<sup>280</sup> Junter-Loiseau, 'La division sexuelle des emplois à l'épreuve de la loi du 13 juillet 1983 relative à l'égalité professionnelle', *Droit Social* (1987) 143 at 150. See also Moreau, *supra* at n.115 at 177.

<sup>281</sup> See in particular Chapters 3 and 4.

<sup>282</sup> See Pettiti, *supra* at n.82 at 309-310; see also Moreau, *supra* at n.115 at 174 who states 'l'arrêt rendu par la Cour... malgré l'émotion qu'il a suscité, n'est pas réellement surprenant au regard des conceptions novatrices et créatrices de la Cour de Justice'. See further Junter-Loiseau, *supra* at n.115 who states 'la cohabitation de cette interdiction avec la directive communautaire...et le principe nationale d'égalité professionnelle...nécessite pour être justifiée, le recours à des "arguties" qui sont loin, sur le strict plan juridique d'emporter la conviction. C'est ce que vient de dire en substance la CJCE dans un arrêt du 25 juillet 1991'.

<sup>283</sup> Junter-Loiseau (1992) *supra* at n.115.

treatment 'treatment' of female night work in the UK, there is a clear and repeated recognition of the problems night work creates for all workers and the need for comprehensive night work regulation.<sup>284</sup> Possible models of alternative night work protection are discussed and the new international night work instruments considered as potential models for France to build on.<sup>285</sup> In other words, the solution is seen as repeal first and reform later.

The advantages and disadvantages that lifting female night work controls might have for women are also aired. The positive aspect of these analyses is that they clearly demonstrate the ill-targeted nature of the current regime, in terms of facilitating workers with family responsibilities or workers exposed to a high risk of nocturnal sexual attack. However, their main problem is that the arguments to build alternative night work protection for all workers are not connected in any way with the problems faced by all those with a heavy burden of family responsibilities, nor those confronted with a high risk of sexual attack due to the lack of nocturnal public transport. And neither of these issues are seen as explicitly articulated with the application of an equal treatment norm, either at supranational level or at national level.

Therefore, while the 'labour law' perspective explicitly places night work inside an equality analysis, but fails to analyse the 'concrete' articulation of female night work with an equal treatment between the sexes norm, the 'equal treatment' perspective recognises the concrete problems night work presents for all workers and the specific problems night work presents for particular groups of workers, but does not articulate this with the operation of an equal treatment norm in the context of its application to female night work. Equal treatment is seen as simply not 'catching' these situations. While it does 'catch' the issue of 'why repeal?' it cannot encompass the issues of 'what reform?' and 'when?'. Therefore, neither of these perspectives succeeds in providing a coherent articulation of the equal treatment between the sexes norm with the need to regulate night work and the needs of certain groups of workers for whom night work presents

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<sup>284</sup> See, for example, Junter-Loiseau (1987) *supra* at n.180 at 148 who states 'ce qui ne signifie pas que ces emplois n'aient pas d'effet sur la santé des salariés quel que soit leur sexe, ou que les conditions d'emploi des femmes ne soient pas plus pénible que celles des hommes. La cause de la pathologie trouvant alors dans l'organisation du travail et non dans la "spécificité" morphologique de la femme.'

<sup>285</sup> Moreau, *supra* at n.115, for example, puts forward a number of options among which the use of derogatory agreements to regulate night work for both sexes is discussed.

additional problems.

#### **6.4 Towards conceptual articulation?: formal and substantive equality in the Italian night work debate**

The Italian debate on female night work is a very rich exchange which, unlike in France, has not faded away following the initial explosion of interest aroused by the *Stoeckel* judgment. This can be partly explained by the fact that it has become an important component in a number of related debates. In particular, a number of cases involving the consideration by national judges of the application of *Stoeckel* in disputes between two private parties have been considered as part of a larger debate on the role of courts as an institution in European integration,<sup>286</sup> and the notions of vertical and horizontal direct effect of directives.<sup>287</sup> Furthermore, the Italian system of female night work regulation has played an important role in a debate on the implications in Italy of allowing collective agreements to derogate from norms of *ordre public*; an issue which has become central in discussions of how to regulate a number of matters.<sup>288</sup> The *Stoeckel* judgment appeared when Italian doctrine was busy dissecting Law No.125/1991. This new sex equality law mandated positive action programs, introduced new institutional actors and procedures in order to facilitate litigation, and provided a new improved definition of indirect discrimination. It provoked an extraordinarily rich strand of doctrinal discussion which considered which forms of sex-specific treatment could (or should) be undertaken under its provisions. This, in turn, involved consideration of what vision of equality mandated different segments of the law and hence the content of - and relationship between - formal and substantive equality, both theoretically and in terms of their constitutional implications. This law and the *Stoeckel* judgment are also linked into a wider discussion which concerns the functions of labour law, the crisis in the old methods of

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<sup>286</sup> Sciarra, 'Dynamic Integration of National and Community Sources: the Case of Night-Work for Women' in T.K. Hervey and D. O'Keeffe (eds), *Sex Equality in the European Union* (Wiley: Chichester, 1996) 97.

<sup>287</sup> These cases are discussed *supra* at n.113 and Section 4.4.2. For recent comments in an abundant literature see Carinci, 'Spunti sul dilemma del giudice fra norme interne e norme comunitarie', *Rivista Italiana del Diritto del Lavoro* (1995) 557; Santoni *supra* at n.157.

<sup>288</sup> For an overview see Romei, *Foro Italiano* (1991) 877.

labour regulation and the need to 'rediscover the individual' in labour law.<sup>289</sup>

Here, however, I will focus on the intersection and application of these debates to the issue of female night work and give some taste of the many discussions on the meaning(s) of formal and substantive equality, and their utilisation in the evaluation of female night work regulation and the ECJ night work jurisprudence.

In order to try to place some order on this very wide-ranging discussion, we can once again turn to the critique levelled at *Stoeckel* by Supiot. This critique was also published in *Lavoro e Diritto*<sup>290</sup> and Supiot's analysis is engaged with in practically all Italian doctrinal comment on the judgment which evaluates the judgment in terms of formal and substantive equality. The ECJ's argumentation is thus carefully examined, as it is the failure of the Court to accept (higher risks of sexual attack) or take into account in any way (unequal distribution of family responsibilities) factual inequalities which Supiot characterises as the expulsion of substantive equality. What differentiates these analyses from those examined so far is that they permit the Court's decision to be categorised as a formal equality decision without the necessary conclusion being drawn that maintenance of the current regime constitutes substantive equality.<sup>291</sup> To put this another way, while the Court's decision (and its vision of discrimination) can be criticised for having failed to consider<sup>292</sup> factual inequalities, this does not mean that the way in which the current norm takes

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<sup>289</sup> This is not to suggest that these debates are confined to Italy although it could certainly be argued that new theories of legal regulation have been more systematically applied and developed in Italian labour law doctrine than in other EC labour law systems. What is important here however is that issues relating to the legal regulation of gender on the labour market have been integrated into (and on occasion dominated) these debates.

<sup>290</sup> Supiot, 'Principi di eguaglianza e limiti della razionalità giuridica', 6 *Lavoro e Diritto* (1992) 211.

<sup>291</sup> This is not meant to indicate, by any means, that there is a homogeneity in Italian doctrinal analysis of *Stoeckel*. The intention is rather to examine ways in which the judgment is evaluated which differ from those so far discussed and to try to outline the conceptual building blocks used to construct these different analyses. For an analysis which sees *Stoeckel* largely as a straightforward application of an equal treatment rule see Roccella, 'Tutela della concorrenza e diritti fondamentali nella giurisprudenza sociale della Corte di giustizia', 15 *Giornale di diritto del lavoro e di relazioni industriali* (1993) 1 especially at 9ff.

<sup>292</sup> For critique of the Court's argumentation see, for example, Rivara, 'Discriminazione, giustificazione ed effettività nella recente giurisprudenza della Corte di giustizia delle Comunità europee', 10 *Lavoro e Diritto* (1995) 81; see also Ballestrero, 'La nozione di discriminazione nella legge n.125/1991', *Rivista Critica di Diritto del Lavoro* (1992) 773.

into account factual inequalities is satisfactory (compatible with substantive equality) either. Therefore the application of an equal treatment norm requires, not only the recognition of factual inequalities, but also consideration of how those factual inequalities should be legally recognised.

To get to this conclusion requires greater differentiation of conceptual categories and, in particular, a more finely tuned analysis of what meaning(s) can be attributed to formal and substantive equality. For the purposes of this discussion, it suffices to say that, in Italian doctrine, great care is taken to separate out the different meanings that may be attributed to formal and substantive equality. These meanings seem to be heavily conditioned by the division in Article 3 of the Italian Constitution which states:

All citizens have the same social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions or personal and social conditions (Paragraph 1).

It is the task of the Republic to remove the social and economic obstacles, which by restricting *de facto* the freedom and equality of its citizens, impede the full development of the human being and the effective participation of all workers in the political, economic and social organisation of the country (Paragraph 2).

Put briefly, Paragraph 1 is seen as mandating 'formal' equality<sup>293</sup> and Paragraph 2 as mandating 'substantive' equality. This pair of concepts are both closely defined and seen as exercising a important role in several different ways in Italian labour law. Thus formal equality requires abstracting from certain differences to consider relevant certain common characteristics. At a constitutional level, this translates, in Art. 3(1), into outlawing a number of grounds on which to

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<sup>293</sup> Though see further the useful clarifications made by Commanducci, 'Su "eguaglianza"' 6 *Lavoro e Diritto* (1992) 589 who points out that even this classic neohumanist formulation of equality (which forbids the taking into account of a wide range of forbidden factors and stating that the relevant factor for the attribution of rights, duties, freedoms etc...is membership of the human race) which is frequently given the label 'formal' is one substantive conception of equality at the logico-linguistic level. For an exposition of equality at the logico-linguistic level see P. Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of "Equality" in Moral and Legal Discourse* (Princeton University Press: Princeton N.H., 1990). What is interesting to note is that a substantive equality rule cannot exist or be formulated in the absence of a pre-existing rule which is consequently defined as formal.

distinguish treatments. The constitutional norm is directed at the legislator while specific anti-discrimination norms are directed at private parties.<sup>294</sup> Ballestrero argues that it is more accurate to term substantive equality 'equalisation' (*eguagliamento*) to emphasise that this is a principle not of equality but of inequality; the unequal treatment which the principle legitimates has as its ultimate objective the realisation of substantive (and not formal) equality as laid out in Art.3(2) of the Constitution.<sup>295</sup>

Within labour law, this analysis of formal and substantive equality is used to denote first, the formal equality of the parties to the labour contract and second, the limitation of this contractual freedom through the application of substantive equality (called labour law). A distinction is furthermore drawn between vertical equality and horizontal equality within labour law. What is important here is that clear connections are drawn between, on the one hand, formal and substantive equality at what we can call the constitutional level and, on the other, horizontal and vertical rules within the substantive equality that comprises labour law. Thus, the horizontal and vertical rules which comprise labour law must be 'checked' against the formal and substantive equality represented either by Art.3 of the Constitution (where legislative norms are concerned) and anti-discrimination provisions (which are directed at norms produced by private parties such as the employer). Furthermore, 'sex equality' norms are fully integrated into this analysis. Thus, for example, Ballestrero cites indirect discrimination as the prime example of a horizontal application of substantive equality.

Because of this 'double-checking', employment provisions are subjected to a criss-cross analysis. The following questions are posed. First, is the norm a substantive norm in relation to the formal equality instituted by the contract of employment *and* secondly, does the norm comply with formal equality (in the Art.3 or anti-discrimination sense)? If it does not, is it a breach of formal equality or an application of substantive equality? In this context, substantive equality is defined by most Italian doctrine solely as the measures which consider as relevant gender differences in order to eliminate the unfavourable consequences (and not the differences) flowing from the existence of

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<sup>294</sup> See Guastini, 'La grammatica di eguaglianza', 6 *Lavoro e Diritto* (1992) 205.

<sup>295</sup> Ballestrero, 'A proposito di eguaglianza e diritto del lavoro', 6 *Lavoro e Diritto* (1992) 577 especially at 578-579.

such differences. Substantive equality measures represent a justified deviation from not taking into account the factors prohibited by the formal equality norm (and its translation into anti-discrimination provisions).<sup>296</sup>

This can be clearly seen in the Italian commentators' disagreement with Supiot's analysis of *Stoeckel* as the 'expulsion of substantive equality'. The clearest and most eloquent exponents of this disagreement are d'Antona and Ballestrero.<sup>297</sup> Ballestrero thus argues that Supiot's reading of the judgment excessively emphasises its already very significant implications. While she describes the judgment as brusque, peremptory and critiques the frivolity with which the Court tossed aside the arguments of the French and Italian governments, she goes on to argue that notwithstanding this:

it seems to me that its significance can reasonably be reduced to the condemnation of the old method of protecting female workers. In other words, I feel that the Court limited itself to passing a negative judgment on those measures... which, in the name of protection, exclude women from a type of work or a sector of employment. If this is the case, the *Stoeckel* judgment contains an important message in terms of method for the legislatures of the Member States: equal opportunities policies are not to be realised through prohibitions, but with positive measures of equalisation.<sup>298</sup>

This emphasis on technique is crucial in separating a critique of the formalistic arguments of the Court from a conclusion that maintenance of the current regime constitutes substantive equality. In this analysis, we manage to get beyond the binary options offered by having to throw nightwork either into an equality or an inequality basket (the UK debate) or deciding that if the *Stoeckel* judgment falls into the formal equality basket, anything else (such as maintenance of the current regime) must fall into the substantive equality basket. Measures must be chosen which are both substantive in terms of labour law and substantive in terms of sex equality. The importance of the issue 'what type of measure?' is further developed by d'Antona who tells Supiot that while the Court can be accused of being 'cross-eyed' it cannot be accused of a conscious expulsion of

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<sup>296</sup> Ballestrero (1992b) *ibid* at 584.

<sup>297</sup> D'Antona, 'Uguaglianze difficili', 6 *Lavoro e Diritto* (1992) 597; Ballestrero (1992b) *supra* at n.295; Ballestrero (1992a) *supra* at n.292; see also the exchange of comments between Foglia, 'Il divieto del lavoro notturno femminile secondo la sentenza Stoeckel' and Ballestrero, 'Dal divieto di lavoro notturno femminile all'autodeterminazione delle donne' in *I Rivista Giuridica del Lavoro* (1992) at 690 and 695 respectively.

<sup>298</sup> Ballestrero (1992b) *supra* at n.295 at 586.



substantive equality. He argues that the judgment by no means logically excludes subsequent positive action programs for female workers where it is shown (for example statistically) that a requirement to work at night would constrain many of the women involved, if not to exit from the labour market, at least to renounce a full employment life. This he argues, demonstrates clearly that what is at stake is neither a

conflict between substantive and formal equality nor between an 'abstract' and a 'sexed' image of the individual but rather, a clear opposition between models of reequilibrating intervention, the first based upon the absolute 'protection' of a difference (the difference being the cultural and social difference which makes night work more harmful for the woman than for the man) and the second on the demonstration *a posteriori* of the negative and disproportionate effects of that same difference (to the extent to which it derives from a discrimination by effects). The former model irrevocably 'fixes' the gender difference, the latter reacts flexibly to the discriminatory effects.<sup>399</sup>

## 7. Conclusion

This chapter has used the issue of female night work regulation to develop and illustrate a number of central themes relating to the utilisation, circulation, definition and evaluation of national and EC sex equality norms. It has attempted to refute two interrelated theses, prevalent in UK analyses of female night work. These are, firstly, the thesis that there is a unilinear relationship between female night work and an equal treatment between the sexes norm and, secondly, that a predetermined outcome flows from this relationship. By looking at the complex interplay of sources and institutional actors participating in the determination of various relationships between female night work and equal treatment norms, it has tried to show that these relationships are context-dependent. Moreover, it has attempted to understand why a particular context forged the relationships between equal treatment norms and female night work regulation that it did and to evaluate the role of different institutional actors (the ILO, the national legislatures, the ECJ and the national courts, the other EC institutions, unions, equality agencies, litigants and doctrinal

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<sup>399</sup> D'Antona *supra* at n.297 at 605. Note that he goes on to argue that the Court was wrong to read the French regulatory model solely as a restriction on the freedom of the woman to work when it could also have been read as a guarantee of the self-determination of the woman on the how and when of working time. He argues that the principle of equal treatment does not prevent the national legislature from reserving to women the right to choose collectively whether or not to work night shifts, rather than giving the employer complete discretion over such delicate decisions regarding the organisation of work. This collective choice by women can be seen in the 1977 law, particularly when read with certain decisions by the Italian courts, invalidating union agreements contested by the majority or all the women concerned.

writers) in shaping these contextual relationships. In particular, it has focussed on the notion of articulation to examine and critically evaluate the stances taken on the relationship between female-specific night work regulation and equal treatment. Articulation has thus been used in a normative sense, to argue for the need for equality norms and other norms of employment regulation to be mutually informing rather than mutually exclusive and to plead for the individual worker to be 'situated' both as a worker *and* as an individual with commitments outside paid work, rather than being 'stereotyped'. In other words, articulation means considering the individual worker both horizontally (*vis-à-vis* other workers) and vertically (*vis-à-vis* the employer) in her social environment. Looked at from this perspective, the static and unproductive binary option offered by straightforward repeal/straightforward retention is unsustainable. Neither of these options succeeds in giving us an adequate framework to regulate the night worker in her social environment (as someone who may have family responsibilities, as someone who risks nocturnal sexual attack, as someone who needs to be given some element of choice over what hours she will choose to work, given that night work presents health risks and social isolation but that these may be compensated for through increased pay and/or reduced hours). The focus must then shift onto the role each of the institutional actors could have played in providing this articulation in the unfolding of the relationships we have witnessed in this chapter and what lessons can be learnt about the form and content such an articulated framework might take.

In France, the UK and at EC level, we saw a substantial degree of polarisation, and hence non-articulation, around repeal/retention by most of the institutional actors. In other jurisdictions, such as Germany, Belgium, the Scandinavian countries and Italy, some degree of articulation was present in the actions of some of the institutional actors. This leads us to another important point: the need to differentiate between the roles different institutional actors can play in the articulation process. Comparison of the ECJ and the German FCC with the EC and German legislature examined in this chapter is instructive here. It is clear that courts, like all institutional actors, have a circumscribed role to play in the articulation of sources. As Sciarra rightly points out, it would be wrong to categorise the negative integration process carried out by national courts and the ECJ with regard to female night work as 'pathological'.<sup>300</sup> We cannot and should not 'blame' the courts for their failure to provide a new, comprehensive set of norms providing articulated

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<sup>300</sup> Sciarra (1996) *supra* at n.286.

protection for the night worker. It is at the door of those responsible for positive integration - the national and supranational legislatures - that such allegations must be laid. Hence, the chapter analysed the role those responsible for determining the outcome of a decision that female night work regulation is incompatible with an equal treatment norm have played in its comparison of some Member States, the EC Working Time Directive and the new international night work conventions. However, this does not mean that the courts have no part to play in the articulation of sources. In particular, the ECJ has a central role to play in the negative integration exchange with the national courts and in helping to shape the parameters of the positive integration debate. The ECJ, in its failure to recognise that the female night worker is exposed to a greater risk of sexual attack, that workers with family responsibilities have particular difficulties with nocturnal work schedules, that night work presents health and social risks for all workers and that collective derogation models and international sources do contain important lessons, has sent out a clear message to the legislator that repeal is acceptable, and has given the national courts and other institutional actors little material on which to construct a more articulated response. The German FCC's response demonstrates that it is possible to formulate a more articulated response and furthermore, when compared with the other national court responses, that the relationship between national courts and the ECJ is far from straightforward and uniform.

Taking articulation seriously also means looking at equality and employment regulation with fresh eyes to see what lessons we can learn about the form and content new legislation might take. The chapter investigated and tried to provide some explanations for the failure for this articulation to take place to any significant extent in France and the UK and contrasted this with Italy to show what benefits can be reaped when equality and employment regulation are considered in tandem.

Here again, it is clear that the comfortable options proffered by unadulterated repeal or retention must give way to more focussed reflection on what type(s) of legislative framework are more likely to encapsulate the needs of enterprises to utilise night work and the needs of those who are employed at night *qua* workers and *qua* individuals. This means, first and foremost, rejecting the line of thought which throws out the regulatory baby with the bathwater. To condemn female night work regulation on the simple ground that it embodies an 'old-style' prohibition model ignores the fact that a particular regulatory technique cannot *per se* be old-fashioned, but rather

is more correctly a critique of the application of the prohibition technique to a particular area. Secondly, it ignores the fact that few of the female night work 'bans' were in fact prohibitions, and that most embodied the type of legislative delegation model now being trumpeted as the cutting edge of new techniques of labour law regulation.<sup>301</sup> Thirdly, our examination of the operation of these 'delegated' models shows clearly that complacency about the adequacy of this type of legislative intervention without further scrutiny would be fundamentally misplaced. The experience of Italian women attempting to challenge the introduction of night work in the courts and the failure of administrative or collective control in France, Italy and the UK to deal with the issues that make it difficult for women to work at night are a salutary reminder in this regard. This does not mean that this type of model must be rejected out of hand. However, it may be necessary to ensure that those controlling the introduction of night work must consider or must negotiate on the issues of transport, child-care facilities etc. In many cases, it will be unrealistic and unfair to expect the employer alone to provide these facilities and State intervention will be necessary. Finally, it is clear that there is no magical blueprint for the shape regulation should take in each country. Relying solely on a collective regulation model in the UK, where around 50% of employees are employed in workplaces where no union is recognised, would amount to an explicit rejection of the need to provide articulated protection for all night workers.<sup>302</sup> Taking articulated protection for night work as our goal, far from being over, a European-wide night work debate has barely commenced.

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<sup>301</sup> The ideas in this paragraph have benefitted enormously from Simitis (1994) *supra* at n.126.

<sup>302</sup> N. Millward *et al.*, *Workplace Industrial Relations in Transition* (Dartmouth: Aldershot, 1992) 70.

## **Chapter 7**

### **Conclusions**

This thesis has followed the advice given by Lord Wedderburn to those embarking on comparative research referred to in the Introduction. It has tried to compare the unfamiliar legal treatment of the familiar social problem of gender equality by following 'the argument wherever it leads'. Doing so took this research into some - for this author - very unfamiliar territory. Even the more familiar landmarks of the UK sex equality landscape lost their comforting normality and ordinariness when viewed from across the Channel. Like all voyages of discovery, this research was often accompanied by the discomforts of uncertainty, disorientation and confusion but it also led to unexpected perspectives and insights.

In this concluding chapter, I will try to draw together some of the discoveries made in the course of this thesis. At the outset of this thesis, it was argued that even a preliminary glance at the development of sex equality in France challenged implicit assumptions on sex equality litigation from three perspectives: from the bottom-up, from the middle ground, and from the top-down. The first part of these conclusions will re-examine these three perspectives in the light of the arguments which have been developed in the thesis. The second part of the conclusions turns to examine more systematically some rather more unexpected perspectives and insights on a theme which constantly reemerged in the course of this piece of research: the meanings given to the terms 'formal' and 'substantive' equality by those evaluating equality in the EC.

#### **1. The use and content of equality sources: from the bottom-up, the middle ground and the top-down**

##### **1.1 The bottom-up: utilisation and ownership of equality laws**

Running throughout this thesis has been a desire to find out under what conditions sex equality laws may be utilised and by whom. It was stressed that in order for sex equality laws to be used by those whose inequality they are addressing, it is wholly inadequate to be content with the bare affirmation that sex equality legislation exists. Indeed, given the economic and informational imbalances between employees and employers, the only litigants likely to exploit sex equality provisions in the absence of effective institutional supports to ensure that women have genuine access to law are likely to be employers. Some good illustrations of this are the night work cases in France, discussed in Chapter 6 and the French Sunday opening cases discussed in Chapter 3.

Arguments on the bottom-up perspective were chiefly developed in Chapter 2. It argued that, unless radically modified, it was almost impossible for women to use the individual litigation model laid down in the EPD as the only required method for realising a complex equality right - equal pay for work of equal value. However, Chapter 2 also pointed out that it was both inadequate and misleading to assess whether the necessary conditions for permitting the use of equal value norms by women were present by examining the range of modifications to this individual litigation model in national legislation. Thus, the (relatively) impressive range of modifications to the French individual litigation model resulted in practically zero litigation, whilst the niggardly implementation of equal value in the UK has produced some important successes, both in terms of developing substantive concepts to challenge the gendered construction of skill and, just as importantly, in uniting women workers in a struggle against the valuation given to so-called 'women's jobs'. Chapter 2 also noted the sobering fact that in most countries of the EC, equal value is merely a theoretical possibility, rather than a right used by women. It examined the potential and actual roles played by institutional enforcers given a role to play in equal value litigation, and argued that an important ingredient in creating the institutional alchemy necessary to allow women to exercise their rights is an institution with a specific sex equality mandate, and sufficient powers and resources to demonstrate that equality rights are 'real' rights.

Chapter 2 also showed that litigation is not only important in its own right. It can also - particularly in the area of equality rights - be an essential prerequisite and natural accompaniment to union strategies of bargaining for the re-evaluation of women's pay in pay structures. The bargaining counter of litigation has proved indispensable to British and Northern Irish trade unions

pursuing equal value campaigns. The low utilisation by women of equality rights should be seen as the most serious problem affecting implementation of sex equality laws in the European Union. It also illustrates the danger that a complacent satisfaction that everything necessary has been done can rapidly set in once a law is passed, making it difficult to re-open arguments on discriminatory pay differentials between men and women.

## **1.2 The middle ground: national courts and dialogue between sources**

Moving on to those rare situations where litigation does take place, Chapters 3, 5 and 6 examined the role of national courts in interpreting national and supranational equality sources in three areas: direct and indirect discrimination, pregnancy and female night work regulation. National courts constitute an essential locus for determining when and how dialogue will occur with supranational sources. How they perceive their relationship with the ECJ is extremely important in understanding the developing dynamic of sex equality law in Europe. As stated throughout this thesis, a picture of supranational equality sources, in particular judgments of the ECJ, automatically flowing down to fill the national judicial cup, is a non-starter as an explanation. Once this explanation has been set aside, more interesting speculations emerge as the national courts are no longer passive recipients, but decision-makers, consciously choosing - against a backdrop of institutional constraints - when to engage in dialogue and on what terms. This thesis demonstrates that in order to develop a more nuanced and realistic account of this dialogue, a number of factors must be taken into account. National courts can not be treated as a single entity. Different courts in different countries will engage in dialogue in different ways and at different times on different issues and for different motives. Each of these differences has constituted an important part of the descriptions of and the explanations for the process of dialogue in various parts of this thesis.

The 'different courts' aspect was perhaps most clearly seen in Chapter 6 in the comparison of the reception of *Stoeckel*<sup>1</sup> by higher courts such as the German Federal Constitutional Court<sup>2</sup> and the

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<sup>1</sup> See Chapter 6 at n. 134.

<sup>2</sup> See Chapter 6 at n. 151.

Italian Cassation Court<sup>3</sup> in 1993, on the one hand, with its reception by the lower courts in France and Italy, on the other.<sup>4</sup> Higher courts are more confident in not simply accepting lock, stock and barrel the terms on which the ECJ has set the debate. This may translate into different reactions. One may be the acceptance of the ECJ's conclusion, but the adjustment of the reasoning and conditions on which this conclusion is accepted. This occurred in the case of the German Federal Constitutional Court in its night work judgment in 1992.<sup>5</sup> Another may be the development of an alternative line of argumentation on equality which bypasses the ECJ's reasoning altogether, as in the Italian Cassation Court's judgment in 1993.<sup>6</sup> Lower courts seemed more deferential to the ECJ, to the point of applying ECJ jurisprudence in cases where straightforward application was not required, either because an ILO norm existed or because the dispute was between two private parties.<sup>7</sup> Chapter 3 also showed a certain tendency for lower courts in the UK to be keener to engage more wholeheartedly in dialogue with the ECJ and supranational sources than appellate courts on contested meanings of equality at national level. Examples of this are the IT in *Marshall No.2*,<sup>8</sup> and the preliminary references in UK cases concerning protection of transsexuals and homosexuals under sex equality provisions.<sup>9</sup>

The 'different countries' aspect is clearly revealed in the comparison of the French and UK courts. Dialogue with supranational sources across a wide range of sex equality arguments is highly developed in the UK. All relevant equality cases emanating from the ECJ are part of the database of sources which will be dealt with by the UK courts when deciding cases on sex equality. In France, by contrast, the database of supranational cases used by national courts seems to be largely confined to cases which are directed specifically to France. In relation to such cases, the French courts will faithfully apply the judgments of the ECJ as we see in the creche bonus cases

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<sup>3</sup> See Chapter 6 at n.113 and n.156.

<sup>4</sup> See Section 4.4.1 and 4.4.2.

<sup>5</sup> *Supra* at n.2.

<sup>6</sup> *Supra* at n.3.

<sup>7</sup> See Section 4 *passim*.

<sup>8</sup> See Chapter 3 at n.80 and Section 2.3.5.4.

<sup>9</sup> See Chapter 3 at Section 2.3.3.1.



resulting from the condemnation of France in infringement proceedings in 1988<sup>10</sup> and the night work cases.<sup>11</sup> However, there are recent and limited signs of the terms of the dialogue being extended, as the pregnancy reference by the *Cour de Cassation*<sup>12</sup> and the use of *Enderby* by the Riom Appeal Court<sup>13</sup> show.

Courts engage in dialogue in different ways, at different times and on different issues. A useful way of clarifying some of the points raised here is to consider the place of the preliminary reference procedure in the process of dialogue. It emerges from Chapter 3 that the preliminary reference procedure has occupied a different position in the sex equality dialogue between UK courts and supranational sources in the two decades in which Community sex equality sources have been actively engaged with by the UK courts.

The 1980s were marked by a predominant tendency to accept EC equality sources only following a preliminary reference to the ECJ or when a high national court (such as the House of Lords in *Rainey*<sup>14</sup>) authoritatively 'interpreted' a judgment by the ECJ (in this case, *Bilka*<sup>15</sup>). Other courts would then apply the national interpretation rather than the ECJ judgment.<sup>16</sup> Therefore, in the 1980s, preliminary references are a good indicator of the extent and type of dialogue occurring before the UK courts on supranational sex equality sources.

In the 1990s this no longer holds true. The UK courts are matter-of-factly dealing with supranational sources and either applying them, distinguishing them or using them for guidance. While preliminary references are still made, the courts have acquired a degree of familiarity with Community sources to remove the necessity to make a preliminary reference as a matter of course

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<sup>10</sup> See Chapter 3 at Section 4.2.

<sup>11</sup> See Chapter 6 at Section 4.4.1.

<sup>12</sup> See Chapter 3 at n.249 and n.251 and Chapter 5 at n.163.

<sup>13</sup> See Chapter 3 at n.236.

<sup>14</sup> See Chapter 3 at n.45.

<sup>15</sup> See Chapter 3 at n.63.

<sup>16</sup> See Chapter 3 at Section 2.2.2.3.

when a Community law point is dealt with. Good examples of this are the use of Community sources on indirect discrimination in *ex parte EOC*<sup>17</sup> and in the Court of Appeal decision in *ex parte Seymour-Smith*<sup>18</sup> and the use of 'soft' Community law such as the EC Code of Practice on sexual harassment.<sup>19</sup>

The way in which the courts engage in dialogue will depend on the issue at stake. UK Courts, particularly appellate courts, were reluctant to teleologically interpret national sources in line with Community law where a clear conflict seemed to exist between the national source and the Community law source, or where the Community law source became unclear. This is most clearly evident in the comparator problem cases discussed in Chapter 3<sup>20</sup> where the courts were reluctant to refer or reopen previously established national interpretations. In Chapter 5, the pregnancy cases showed that while this strategy of avoidance in dealing with a particular comparator problem area continued, it was more difficult to sustain in an area where the Court had an established jurisprudence.<sup>21</sup> The changing approach taken by UK courts to time-limits and remedies issues shows that where EC jurisprudence is muddled and the stakes are high, national courts will split on whether to restrictively interpret EC provisions to preserve the status quo at national level or refer the matter to the ECJ.<sup>22</sup>

The question of what issues will be drawn into dialogue also brings out a point made in Chapter 3 in relation to part-time work and Chapter 5 in relation to pregnancy protection. This is that the need to exploit national and supranational equality sources may be less pressing (though not redundant) in France, because other national employment provisions already provide a more adequate level of provision than that found in the UK.<sup>23</sup>

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<sup>17</sup> See Chapter 3 at n.144.

<sup>18</sup> See Chapter 3 at n.146

<sup>19</sup> See Chapter 3 at Section 2.3.2.

<sup>20</sup> See Chapter 3 at Section 2.3.3.

<sup>21</sup> See Chapter 5 at Sections 3.3, in particular Section 3.3.5.

<sup>22</sup> See Chapter 3 at Sections 2.3.5.2 and 2.3.5.8.

<sup>23</sup> See Chapter 3 at n.248; Chapter 5 at Section 3.5.

Finally, to return to the issue of preliminary references, very different motives may lie behind the decision to make a reference to the ECJ by a national court. At least four possibilities emerge from a re-examination of the national courts making preliminary references in the cases discussed in this thesis. The first, and most straightforward motive may be a simple desire to know what the EC law position on a particular position is. Examples of this may be the references on the impact of Community law on s.6(4) SDA by UK courts in the 1980s discussed in Chapter 3<sup>24</sup> and the night work references in France discussed in Chapter 6.<sup>25</sup> The second possible motive is that a national court wishes to endorse a particular interpretation of sex equality and is either prevented from doing so by national law or precedent, or believes that the ECJ will give further authority to a particular piece of national legislation or a particular interpretation of national legislation. An example of the former may be the IT reference in *P v. S*,<sup>26</sup> while the reference in *Kalanke* by the Federal Labour Court in Germany<sup>27</sup> may be an example of the latter. The third possible motive is the desire by a national court to displace responsibility for a contentious decision. A possible example of this may be the House of Lords reference in *ex parte Seymour-Smith*.<sup>28</sup> The fourth motive for referring may be reluctance to accept a particular ECJ interpretation. In this context, the reference constitutes both a warning to the Court of the unacceptability of its position and an invitation to the Court to shift its position. A UK example of this may be the reference in *Brown v. Rentokil*.<sup>29</sup> However, the clearest evidence of this motive is undoubtedly found in post-*Botel*<sup>30</sup> references made by German courts where the referring courts are clearly trying to educate the ECJ and to convince it that it has misunderstood the nuances of the rationale underlying payment for staff council or staff committee activities.<sup>31</sup>

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<sup>24</sup> See Chapter 3 at Section 2.2.3.

<sup>25</sup> See Chapter 6 at Section 4.3.

<sup>26</sup> See Chapter 3 at n.100.

<sup>27</sup> See Chapter 4 at n.67 and Section 5.1.3.

<sup>28</sup> See Chapter 3 at n.146.

<sup>29</sup> See Chapter 5 at n.109.

<sup>30</sup> See Chapter 3 at n.147.

<sup>31</sup> See, Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation v. Lewark* [1996] ECR I-243, especially paragraphs 11-16 of the judgment. See also Case C-278/93 *Freers and Speckmann v. Deutsche Bundespost* [1996] ECR I-1165. Both the Bundesarbeitsgericht in *Lewark* and the Arbeitsgericht of Bremen in *Freers* went to great

Two final points about the ‘middle ground’ of dialogue between sources can be made. The first is that these reflections are a tentative and non-exhaustive set of starting points in an area where much more work needs to be done. In particular, research on dialogue with sex equality sources in German courts is essential to expand, refine and enrich our understanding of the production and circulation of EC sex equality jurisprudence.

The second point is that, while it is important to move away from the idea that ECJ judgments on sex equality arrive unproblematically in all national legal orders, it is also important not to get completely carried away by the idea of national courts as wholly autonomous decision-makers, who are completely free to set the terms of their dialogue with EC sex equality sources. While being in the middle brings certain benefits, it also means being sandwiched between the bottom and the top. From the bottom, where EC sex equality sources are argued by litigants before national courts, it is well-nigh impossible for national courts to ignore them. Where the litigants do not argue EC sources, it will be difficult for the courts to get involved in dialogue. From the top, where dialogue is embarked upon, ultimately the ECJ is boss. Dialogue takes place in a context where national courts are subject to a supranational legal order whose authoritative interpreter is the ECJ. This makes it important to briefly examine the ‘top’ and the implications of how the Court has interpreted sex equality sources.

### **1.3 The top-down: the ECJ and equality sources**

Chapters 3, 4, 5 and 6 all give strong grounds for arguing that, in its interpretation of equality sources, the ECJ has failed to articulate consistently the development of substantive equality concepts with the situation of women on the labour market. This is not to argue that it has always failed nor that it consistently does so. The ECJ has been central in developing certain extremely important interpretations, such as in the field of indirect discrimination<sup>32</sup> and pregnancy

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pains in their references to state that they were not persuaded by the Court’s reasoning in *Botel* and that the Court is in need of a fuller explanation of the legal status of staff council membership under German industrial relations law. These cases also show that a repeated reference strategy may have a significant effect on how the ECJ phrases its responses.

<sup>32</sup> See Chapter 3 at n.45, n.145 and n.147.

protection.<sup>33</sup> However, it has also shown that it will not necessarily stick to the useful interpretations it has developed<sup>34</sup> and that it is capable of badly reasoned judgments which show little trace of understanding of the forms of discrimination women encounter on the labour market.

Thus, in Chapter 3 it was argued that the Court's interpretation of indirect discrimination under the ETD has, on the whole, not been very impressive.<sup>35</sup> Indeed the UK courts have made much more courageous interpretations of indirect discrimination under the ETD in cases such as *ex parte Seymour-Smith*<sup>36</sup> than the ECJ has done in *Kirshammer-Hack*.<sup>37</sup> Moreover, the bulwark of strong indirect discrimination case law built up under Art.119 and the EPD is under threat from cases such as *Nolte* and *Megner*.<sup>38</sup> Similarly, Chapter 4 attacked the Court's narrow interpretation of the equality principle in *Kalanke*,<sup>39</sup> the fact that its interpretation of the ETD derogations was both inconsistent and insufficiently attuned to gender issues,<sup>40</sup> and its failure to examine carefully enough whether the problems facing women like Ms Glissman were best addressed by the measure challenged because of the nature of the discrimination being tackled.<sup>41</sup>

In both Chapters 4 and 5, the Court's interpretation of Art.2(3) was challenged, chiefly on the grounds that the line in the sand drawn in *Hofmann*<sup>42</sup> between family organisation and market organisation, and repeated thereafter is arbitrary, unhelpful, unnecessary and, at least at the level of legal imagination, a serious impediment to drawing within sex equality's encompass the need to take active measures to involve fathers in caring for young children. It was argued that to press

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<sup>33</sup> See Chapter 5 at Section 3.3.1.

<sup>34</sup> See Chapter 5 at Section 3.3.6

<sup>35</sup> See Chapter 3 at Section 3.

<sup>36</sup> See Chapter 3 at n.146.

<sup>37</sup> See Chapter 3 at n.206.

<sup>38</sup> See Chapter 3 at n.154.

<sup>39</sup> See Chapter 4 at Sections 5.1.3.1 and 5.1.3.5.

<sup>40</sup> See Chapter 4 at Section 5.1.3.4.

<sup>41</sup> See Chapter 4 at Section 5.1.3.5.

<sup>42</sup> See Chapter 4 at Section 5.1.3.4 and Chapter 5 at Section 5.3.1.

for a more equal distribution of care between male and female parents was a better use of equality arguments than to argue for female-specific care benefits or treatments.

In Chapter 5, it was also argued that, like the UK courts, the ECJ has been prepared to play with the guidelines it laid down in *Dekker*<sup>43</sup> and *Hertz*<sup>44</sup> for pregnancy protection when it seemed expedient for it to do so.<sup>45</sup> Both the possible exclusion of fixed-term contracts from pregnancy protection and *Gillespie* illustrate this. In Chapter 6, the Court's cavalier treatment of international labour norms and its failure to articulate the incompatibility of sex equality and female night work with the employment protection objectives of such regulation was pointed out and criticised.<sup>46</sup>

Throughout this thesis, the tendency for those in the UK to see EC sex equality law as a brightly shining star has been demonstrated to be justified. Despite some significant setbacks, playing the EC card has often been a positive experience in attempts to achieve legal outcomes it would otherwise have been difficult to achieve. We have also seen that the EC star may shine less brightly in other national contexts, either because it is less relevant as in France, or because national legislation or national judicial developments have delivered more in terms of gender equality. Hence, the EC star must be shining less brightly in Germany in the wake of decisions such as *Kalanke*, *Nolte* and *Megner*. Despite the fact that analysis of the Court's interpretation of the ETD in this thesis has been largely critical, a comparative perspective underlines the fact that it would be wrong to either paint the ECJ's record in wholly positive or wholly negative terms. It has a patchy record which is probably no better or worse than that of many other courts which decide sex equality cases.

However, unlike other courts, because of its position in the judicial and legal hierarchy and the importance of its role in fleshing out and giving meaning to EC sex equality obligations, the ECJ

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<sup>43</sup> Chapter 5 at Section 3.3.3.

<sup>44</sup> Chapter 5 at Section 3.3.4.

<sup>45</sup> Chapter 5 at Section 3.3.6.

<sup>46</sup> Chapter 6 at Sections 4.3.1 to 4.3.4.

has the capacity to close off certain understandings of equality on a European-wide scale. In a rather final sense, therefore, it constitutes a 'court of last resort'. Only the fairly remote prospect of EC legislation will be capable of remedying an unhappy interpretation in such an event. In this respect, those who wish to use litigation or introduce certain types of legislation which would provide the legal opportunities for making gender equality more of a reality have little choice but to be anxious Court-watchers. Recent signs of the direction in which the ECJ appears to be moving have not been encouraging. This means that litigation may become a much more hazardous area for those attempting to improve women's rights on the labour market. The insulation of ignorance is no longer available in those countries which have engaged in wide-ranging dialogue with the ECJ in order to obtain better results than at national level. The option of using selectively those bits of indirect discrimination case law (such as the case law up to and including *Enderby*) which are favourable and discarding less favourable interpretations (such as *Nolte* or *Megner*) which may emerge is not available. Similarly, *Kalanke* is now available for disgruntled men in any Member State to utilise in challenges to other types of positive action measures. It may also prevent other Member States introducing such legislation.

## **2. Evaluating equality laws and the meanings of formal equality and substantive equality**

The second theme which has emerged throughout this thesis relates to the how to evaluate the effectiveness of equality laws and the closely connected issue of the meanings attributed to formal equality and substantive equality. Uncovering these meanings was crucial for two reasons. First, along a comparative axis, a number of important and interesting differences emerged in the ways in which these terms were used. Second, along an evaluative axis, these terms were employed to criticise, to classify and to silence opponents. There is no doubt that the language of equality is one of the most important resources disadvantaged groups possess. As Jeremy Waldron has stated,<sup>47</sup>

Everyone knows that sexual and racial differences have been used in the past to justify profound differences of treatment, rights and social status. Racist and sexist institutions have involved the ranking of human beings, the determination of how much each is worth in relation to the others, and the claim that the interests of some can be outweighed by the

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<sup>47</sup> Waldron, 'The Substance of Equality', 89 *Michigan Law Review* (1991) 1350 at 1363.

interests of others simply because the former are inferior .... We become aware how much of our modern political thinking rests on the profound denial of such rankings. As we become aware of that, we can see, I think, how natural it is to express that denial using the term 'equality' ... 'Equality' has the extra and important resonance of indicating the sort of heritage we are struggling against.

I am completely in favour of the resonances equality possesses being manipulated, and used rhetorically and as a banner or slogan where that is helpful in advancing the position of disadvantaged groups. However, I am not convinced that these sloganistic uses are helpful in doctrinal writings. In the course of this research, I came across many instances where a clearer definition of how and why the terms 'formal equality' and 'substantive equality' were being used would have facilitated more nuanced analysis and a higher quality of debate. Indeed, at times, these terms were used as a substitute for analysis rather than a part of the analysis itself.

In order to help achieve this clarity, it is useful to briefly set out and discuss the ways in which equality effectiveness can be evaluated and how 'formal equality' and 'substantive equality' have been used in discourse about equality. In Chapter 4, three uses of how the effectiveness of equality can be measured and how 'formal equality' and 'substantive equality' have been employed in the UK debates were outlined: as a means of evaluating respectively legal reach, theoretical reach and actual reach.<sup>48</sup> But this does not encompass all the ways in which equality has been evaluated nor all the ways in which the terms 'formal equality' and 'substantive equality' have been employed in this thesis.

## **2.1 As 'mobilization' around 'law'**

This corresponds in part with the 'bottom-up' perspective discussed above. It is concerned with the extent to which the disadvantaged group addressed by a particular equality law was involved in its formulation, how easy it is to utilise the rights therein and to what extent the disadvantaged group can identify with the law as 'their' law. This perspective is well encapsulated in the following comment by Hoskyns,<sup>49</sup>

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<sup>48</sup> See Chapter 4 at Section 4.2.2.2.

<sup>49</sup> 'Women's Equality and the European Community', 20 *Feminist Review* (1985) 71 at 74.



The lack of mobilisation over both the adoption and implementation of equality laws has in fact been very disadvantageous to women. For the precise way in which these laws are drafted, and the extent to which the provisions which do exist are taken up and used, can make the whole difference between laws which assert a formal equality only, and those which begin to tackle the substantive problems which create inequality in the first place.

This perspective can also be used to critique specific enforcement methods, such as individual litigation<sup>50</sup> or to question the use of law at all to advance the cause of women, given the fact that it is difficult to identify with an alienating institution such as law. For example, Nicola Lacey states,

the emphasis on individual cases ...poses some particularly acute problems from a feminist viewpoint [...] It entails a diversion of attention away from the idea of sexism as a structure or institution - an idea which is crucial to a feminist vision.....doubts must arise as to whether the legal forum really represents a useful place in which to attempt to advance arguments for women's liberation, or to seek concrete improvements in the treatment of women in our society.<sup>51</sup>

## 2.2 As a critique of symmetrical and comparative approaches

The terms 'formal equality' and 'substantive equality' are often employed in both legal reach and theoretical reach terms to dub the structure of legislative provisions or their judicial interpretation as 'formal' - where they are symmetrical and based on male comparators and 'substantive' - where they are asymmetrical and not reliant on a male comparator. As we saw in Chapter 5, this use most often arises in assessing how pregnancy is categorised in judicial interpretations.<sup>52</sup> Hence *Dekker* is classified as substantive and *Hertz* is classified as formal. While it is useful to critique in these terms, at times these classifications tend to 'spill over' to mean that any asymmetrical female provision is 'substantive'.<sup>53</sup>

More nuanced uses of these terms are made by Lacey who argues that anti-discrimination

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<sup>50</sup> See Chapter 2 at Section 4..

<sup>51</sup> Lacey, 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective', 14 *Journal of Law and Society* (1987) 411 at 417-418.

<sup>52</sup> See Chapter 5 at Section 3.3.3*bis* and Section 3.3.4*bis*.

<sup>53</sup> See the critique of this spillover in Chapter 4 at Section 5.1.3.3.

legislation should only be addressed to disadvantaged groups<sup>54</sup> and Fredman, in her analysis of the ECJ pensions jurisprudence, who argues, not against the use of comparators *per se*, but against the implicit attribution by the Court of the same characteristics in terms of labour market participation to a female comparator as to the male claimant.<sup>55</sup>

### **2.3 As evaluations of equality strategies**

Chapters 2 and 4 developed the argument that the types of legal strategies employed at present to combat gender inequality can be divided into two different methods of resolving the problems women face on the labour market: desegregation strategies which aim to move women up and out of the jobs they are in and re-evaluation strategies which aim to improve the situation of the jobs women are in. Chapter 1 showed that both the French and the UK legislative maps contained the potential for both of these strategies to develop. However, it emerged in Chapters 2 and 3 that the subsequent development of the legislative map in the UK has heavily privileged re-evaluation through litigation and litigation-linked strategies, whilst in France, litigation has been almost completely absent and hopes have been pinned on realising equality through desegregation in negotiated positive action plans.

The explanation put forward in Chapters 2 and 4 for the different developments of the legislative maps developed the argument that this was because different emphases were placed in each country on the relative importance of each of these two types of strategy. Hence, in France litigation and re-evaluation strategies were linked and viewed as 'formal', whereas desegregation strategies were viewed as 'substantive'.<sup>56</sup> In the UK re-evaluation was given positive connotations.<sup>57</sup>

### **2.4 As disagreements on whether legal measures breach equality norms.**

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<sup>54</sup> Lacey *supra* at n.51.

<sup>55</sup> Fredman, 'The Poverty of Equality: Pensions and the ECJ', 25 *ILJ* (1996) 91.

<sup>56</sup> See Chapter 4 at Section 4.1.

<sup>57</sup> See Chapter 4 at Section 4.2.

In Chapter 4, we saw that arguments were made by some that ‘positive action’ was substantive equality and by others, such as the ECJ on one form of positive action,<sup>58</sup> that it was a breach of equality or anti-equality. Similar arguments emerged in a different context in Chapter 6 where we see some arguing that female-specific night work regulation was anti-equality and others claiming that female-specific night work regulation was substantive equality. The arguments on female night work are best explained as the use of equality in two different senses: the vertical equality sense and the horizontal equality sense, and for that reason will be discussed below. On the positive action issue, it was argued in Chapter 4 that it is misleading and mistaken to automatically dub anything presented as positive action as either *per se* ‘substantive’ or *per se* ‘anti-equality’.<sup>59</sup>

On the *per se* substantive argument, the quantity and quality of positive action in the UK and France was examined to show that positive action often translates into more effective human resource management and that, in the UK, it frequently encompasses measures which exclusively allow women to take long periods of unpaid leave from the labour market.<sup>60</sup> Evidence from Germany showed that even one of the most exciting and one of the most ‘substantive’ of positive action measures - the *Frauenquote* - was ineffective in isolation. To work, it needed to be accompanied by other less exciting measures, such as goals and targets and challenges to indirect discrimination. The danger of dubbing any type of measure ‘substantive’ is that it risks both the cutting off further analysis into how the measure works in practice and the sidelining as ‘less useful’ of ‘less substantive’ measures such as the prohibition of direct and indirect discrimination and the pursual of equal pay for work of equal value.

On the *per se* inequality argument, the *Kalanke* judgment was investigated to argue that the Court failed to examine whether the discriminatory structural and social practices preventing women progressing in the public service were susceptible to realistic challenge through any other of the mechanisms which the Court has developed in its interpretation of the equality directives. Failure to do this led it to wrongly conclude that there were no obstacles to be removed and that the

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<sup>58</sup> The *Frauenquote* adopted in many German states.

<sup>59</sup> See Chapter 4 at Section 5.1.3.5.

<sup>60</sup> See Chapter 4 at Sections 5.1.1 and 5.1.2. and Chapter 5 at Section 5.1.

*Frauenquote* breached the equality principle.

## 2.5 As the failure of equality laws to open up the public/private divide

Both Chapter 4 and Chapter 5 argued that one of the greatest problems with the interpretation of sex equality laws is the failure to open up the connections between female disadvantage on the market and the care responsibilities borne by women. The starkest manifestation of this is in the *Hofmann* judgment.<sup>61</sup> Similar argumentation is reiterated in *Stoeckel* and *Bilka* where the Court stated that matters dealing with family organisation fell outside the scope of EC sex equality sources.<sup>62</sup> To challenge this type of 'formal' argumentation is the most important task facing equality lawyers in the European Union today.

A brilliant way of opening the path to challenge is provided by Scheiwe.<sup>63</sup> She argues that we should not take law's own ideology of separated spheres too seriously and challenges the Court's separation in *Hofmann* of the family and the market on the basis of its own jurisprudence in other areas. By comparing the ECJ's jurisprudence in the area of migrant workers where the family is 'in' and that of discrimination on grounds of sex where the family is 'out', she argues,

the rigid separation of different spheres in the predominant interpretation of EC law (as far as equal treatment of men and women is concerned) might contribute to the perpetuation of the traditional gendered division of labour and segmentation of labour markets. This line of argument at first sight ignores the interconnectedness and separates the spheres by artificial surgery. This is however, an impossible operation, and the attempt to reduce complexity in order to avoid contradictions in law can only be maintained to a degree. My hypothesis is that the interconnectedness between various spheres is taken on board mainly when it is to the advantage of men (which is in conformity with predominant legal constructions). Here the family enter through the front door, and case law has the effect of stabilising the existing gendered division of labour.<sup>64</sup>

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<sup>61</sup> See Chapter 5 at Section 5.3.1.

<sup>62</sup> See Chapter 5 at n.191.

<sup>63</sup> 'EC law's unequal treatment of the family: the case law of the European Court of Justice on rules prohibiting discrimination on grounds of sex and nationality', 3 *Social and Legal Studies* (1994) 243.

<sup>64</sup> *Ibid* at 248.

Capitalising on the inevitable incoherence and arbitrariness inherent in attempts to cleanly separate market from non-market issues is vital in order to give both male and female workers the chance to care and to have financial autonomy.

## 2.6 As concepts in labour law and sex equality

In Chapter 6, the different development of arguments on the relationship between female night work and a sex equality norm in France, the UK and Italy fell to be explained. It was argued that the best explanation involved investigating the degree to which the conceptual apparatus of sex equality is articulated with the conceptual apparatus of labour law. The chapter sought to demonstrate that in both France and Italy, labour law is more clearly articulated in terms of formal and substantive equality than in the UK. In other words, in France and Italy, vertical inequalities are evaluated in terms of formal and substantive equality. In the UK, the conceptual apparatus of sex equality in terms of 'formal' and 'substantive' equality is highly developed. Given the relative lack of a similarly strong, and similarly conceived, labour law apparatus, female-specific night work regulation was easy to dismiss as 'anti-equality' and made it difficult to argue for any particular outcome to this conclusion. In other words, there was a low degree of articulation between labour law (tackling vertical inequality) and sex equality (tackling horizontal inequality). In France, the predominant interpretation of the ECJ's condemnation of female night work in *Stoeckel* was in terms of the language of 'formal' and 'substantive' inequality within the conceptual apparatus of labour law. This meant that the Court's decision was condemned as formal and that female night work regulation was viewed as substantive. While *Stoeckel* was also analysed in France within a sex equality conceptual apparatus, and viewed as correct, as in the UK there was a low degree of articulation between the conceptual apparatus of labour law and the conceptual apparatus of sex equality. The treatment of night work in Italy was examined to show how conceptual articulation might work.

The above argument is put forward not merely as a description but also as a prescription. To fail to articulate - adequately and continually - vertical inequality issues with horizontal inequality issues creates an environment where either levelling down is acceptable or ill-targetted legislation which aims to protect some women is allowed to continue its existence. *One of the problems with*

sex equality being the most brightly shining star in the EC firmament is that, not only is it not well articulated with vertical inequality issues, but there is little in the EC social policy landscape with which it can articulate. To develop stronger arguments for labour legislation which protects the needs of all men and women as individuals and as workers, we must strive to develop and sustain lasting connections between vertical equality and horizontal equality.

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